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Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses

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Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses

Jeffrey L. Harrison[†]

Unlike virtually any other business, expert witnesses are not typically held accountable in either tort or contract law for their commercial activities. This means that many are inclined to deliver what the market demands—partisan, biased, or plainly dishonest testimony—without concern for the costs this testimony may impose on others. This immunity from the internalization of the social cost of their testimony is hard to reconcile with any moral or economic standard. Harsh judicial reactions to some experts and a slight increase in expert witness liability may signal that a change in the privileged status of experts is in the offing.

This Article examines the social costs of the current system and surveys the ways in which courts and adversely affected parties have attempted to bring expert witness excesses under control. The efforts range from judicial attempts to embarrass experts to actions by the parties retaining the expert and by those adverse to the expert. In the end, none of these measures seem to have had much effect.

Two general proposals are made. The first is to decrease appeals to judges and jurors based on institutional authority. Institutional authority—the reliance on credentials—can be misleading in two ways. First it may suggest more about the competency of the witness than is warranted. Second, it may be taken to mean that the highly credentialed expert is more likely to be objective. This is also an unwarranted inference. The second proposal is to make experts more accountable to both friendly and adverse witnesses. This liability would be based on deviations in testimony from what the expert knows or should know would be acceptable by peers in his or her area of expertise.

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Introduction

Recent judicial opinions evaluating expert witnesses and their testimony suggest that many judges have become increasingly skeptical of the competence and ethical standards of experts. This is most clearly indicated in a recent decision in which Judge Kocoras of the Northern District for the Seventh Circuit Court of Appeals comments on the testimony and work of Nobel Prize winning economist Robert Lucas.¹ According to Kocoras, Lucas made use of an "ostrich approach,"² showed "disdain for reality,"³ "abdicated entirely the concept of the independence of expert witnesses,"⁴ and offered opinions that "were not only not based

1 See *In re Brand Name Prescription Drugs Antitrust Litigation*, 1999 WL 33889 (N.D. Ill. 1999). See also David Greising, *His Testimony in Drug Case Deserves an F*, CHI. TRIB., Dec. 2, 1998, at Business 1.

2 1999 WL 33889 at *12.

3 *Id.* at *11.

4 *Id.*

on the evidence, [but] were inconsistent with it.”⁵

Kocoras is hardly alone in his scorn for some experts’ opinions. In response to an expert testifying on the merits of various automobile door latches, Judge Richard Posner also does not mince words: “[T]he testimony [was that of] either a crank or, what is more likely, of a man who is making a career out of testifying for plaintiffs in automobile accident cases in which a door may have opened: at the time of trial he was involved in 10 such cases.”⁶ The responses of these two judges to the expert witnesses can be best described as “outing.” This “outing” of experts does not always take the form of a direct personal attack. For example, sometimes judges nonchalantly dismiss the testimony as “worthless.”⁷ In other instances, the expert is “undressed” as the court describes in detail an obviously faulty and biased methodology.⁸

Judges are not alone in their dismissals; a great percentage of jurors doubt the competence and ethics of expert witnesses. A 1992 poll conducted by the National Law Journal and Lexis found that over thirty percent of jurors polled in civil cases reported that the experts were biased.⁹ The most unsettling aspect of this number is that it does not matter whether jurors correctly recognize the biases of experts.¹⁰ If jurors—rightly or wrongly—discount expert testimony, the damage to the system is done. While jurors’ distrust is high, it evidently is not as high as some observers feel it should be. One experienced litigator who was surprised by the survey results observed, “It means we have a lot of good actors as experts.”¹¹ The acting analogy is probably not hyperbole. A past president of the Defense Research Institute observed, “If you put on a Hollywood actor as a physicist, he’s going to convince the jury. Albert Einstein, on the other side, might lose since he’s not articulate; he’s a frumpy guy who hasn’t had a haircut in three years.”¹²

5 *Id.* This was not the first time in the history of the *Brand Name Prescription Drug Antitrust Litigation* that Judge Kocoras was direct in his expression of dismay about the quality of the work in an expert witness. See *infra* note 98.

6 *Chaulk v. Volkswagen of America, Inc.*, 808 F.2d 639, 644 (7th Cir. 1986) (Posner, J., dissenting).

7 *E.g.*, *Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic*, 152 F.3d 588, 593 (7th Cir. 1998). This type of judicial expression can be viewed as an informal and inexact fine levied against the expert. This is because a public admonition may make the expert less attractive to those in search of expert witness services in the future. This point is also made by Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999) [hereinafter Posner, *Economic Approach*]. A shorter article focusing on expert witnesses but duplicating much of what is found in the Stanford article is Richard A. Posner, *The Law and Economics of the Economic Expert Witness*, J. ECON. PERSP., Spring 1999, at 91.

8 *See e.g.*, *Southern Card & Novelty v. Lawson Mardon Label*, 138 F.3d 869 (11th Cir. 1998); *American Airlines, Inc. v. Allied Pilots Ass’n*, 53 F. Supp. 2d 909 (N.D. Tex. 1999); *In re Aluminum Phosphide Antitrust Litigation*, 893 F. Supp. 1497 (D. Kan. 1995).

9 *Expert Witnesses Found Credible by Most Jurors*, NAT’L L.J., Feb. 22, 1993, at S4. *See also* Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1123-24 (1997); Neil Vidmar, *The Performance of the*

This overview suggests what many familiar with the expert witness phenomenon already know: Expert witness testimony is characterized by distrust and cynicism from judges, juries, and lawyers.¹³ The underlying thesis of this Article is that much of the conduct of experts and the distrust to which it gives rise can be traced to the fact that the expert witness system is treated differently than other businesses. In fact, expert witnesses completely escape many of the controlling effects of contract and tort law. Yet there is no reason to believe that those who sell expert testimony are any less responsive to revenues, costs, and market demand than other businesses.

The special status of expert witnesses stems from the generalized immunity offered all witnesses. This immunity is explained by the United States Supreme Court in *Briscoe v. LaHue*:¹⁴

A witness's apprehension of subsequent liability might induce two forms of self-censorship. First, witnesses might be reluctant to come

American Civil Law Jury: An Empirical Perspective, 40 ARIZ. L. REV. 849, 863-66 (1998). The skepticism of jurors is probably well founded. See Gary N. McAbee, *Improper Expert Medical Testimony: Existing and Proposed Mechanisms of Oversight*, 19 J. LEGAL MED. 257, 258-59 (1998); Patricia K. Woolf, *Deception in Scientific Research*, 29 JURIMETRICS J. 67 (1988).

10 The distrust is not evenly distributed. One study found that jurors tended to distrust experts testifying for the defendant more than those testifying for the state in criminal trials. See Sundby, *supra* note 9. The initial biases of jurors appear to be the opposite in civil cases. See Daniel W. Shuman et al., *Assessing the Believability of Expert Witnesses: Science in the Jurybox*, 37 JURIMETRICS J. 23, 29 (1996) [hereinafter Shuman et al., *Science in the Jurybox*]. See generally Daniel W. Shuman, et. al., *Juror Assessments of the Believability of Expert Witnesses: A Literature Review*, 36 JURIMETRICS J. 371 (1996).

11 *Expert Witnesses Found Credible by Most Jurors*, *supra* note 9. Or as one small firm practitioner observes, "There are a lot of experts out there and most of them are not above testifying for the right price." Theodore M. Becker, *Expert Testimony is Crucial, and It's Not Always Expensive*, MERRILL'S ILL. LEG. TIMES, July 1997, at 7.

12 *Expert Witnesses Found Credible by Most Jurors*, *supra* note 9. For an extreme view in the context of forensic psychology, see MARGARET A. HAGEN, *WHORES OF THE COURT* (1997). There is empirical evidence that the cynicism about expert witness testimony is justified. One study of plaintiffs' experts over a ten-year period in Massachusetts found that 37% of the testimony contained errors or incorrect statements. See McAbee, *supra* note 9 (citing Safran, Skydell & Ropper, *Expert Witness Testimony in Neurology: Massachusetts Experience 1980-1990*, 2 NEUROLOGY CHRON. 1 (1992)).

13 See Stephen D. Easton, "Yer Outta Here!": *A Framework for Analyzing the Potential Exclusion of Expert Testimony Under the Federal Rules of Evidence*, 32 U. RICH. L. REV. 1 (1998); Michael H. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. ILL. L. REV. 43 (1986); Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113 (1991); Eric G. Jensen, *When "Hired Guns" Backfire: The Witness Immunity Doctrine and the Negligent Expert Witness*, 62 UMKC L. REV. 185 (1993); Richard H. Underwood, *X-Spurt Witnesses*, 19 AM. J. TRIAL ADVOC. 343 (1995).

I do not mean to imply that the distrust and cynicism are new. For example, in an 1899 case, *Keegan v. Minneapolis & St. Louis R. R. Co.*, 78 N.W. 965 (1899), Judge Mitchell for the Supreme Court of Minnesota wrote, "Experts are nowadays often the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'experts.'" *Id.* at 966.

14 460 U.S. 325 (1983).

forth to testify. . . . And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability. . . . Even within the constraints of the witness's oath there may be various ways to give an account or to state an opinion. These alternatives may be more or less detailed and may differ in emphasis and certainty. A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence.¹⁵

Although state and federal courts frequently cite *Briscoe* to extend immunity to expert witnesses,¹⁶ the case did not involve expert witnesses. As support for its proposition, the court cited a 1909 article entitled, "Absolute Immunity in Defamation: Judicial Proceedings."¹⁷ Moreover, *Briscoe* fits awkwardly into the expert witness context because the reasoning in the case takes on a completely different character when the witnessing involved is essentially a commercial enterprise and subject to powerful market forces. The "reluctant" expert or the expert inclined to "magnify uncertainties" is not likely to find his or her services in great demand.

Recently, Judge Posner applied an economic analysis to expert witnesses. He defends the status quo and concludes that the problem of "partisanship," which I will call "dishonesty," is not especially grave. Posner identifies a number of factors that dissuade experts from being overly partisan.¹⁸ Posner's analysis is insightful but falls short in a number of respects.¹⁹ The principal limitation is his failure to fully account for the fact that experts, like all producers, aim to satisfy those that demand their services. In short, experts are paid to be "effective," but not necessarily to be nonpartisan or even honest. Ironically, here it is Posner who seems to have underestimated the power of the market to deliver what is demanded.

Part II of this Article undertakes a more detailed analysis of the costs associated with expert or commercially available testimony. These costs are analogous in many respects to the costs associated with unfair competition in traditional markets. Those who make testimony

15 *Id.* at 333 (internal citations omitted). The case concerned a suit against police officers by defendants at criminal trials under the Civil Rights Act of 1871.

16 *See, e.g.,* Lobardo v. Taughber, 990 S.W.2d 958 (Tex. 1999); Provencher v. Buzzell-Pluorde Assoc., 771 A.2d 251 (N.H. 1998); Johnson v. Griffin, 922 P.2d 860 (Wy. 1996); Lythgoe v. Guinn, 884 P.2d 1085 (Alaska 1994); Panitz v. Behrend, 632 A.2d 562 (Pa. 1993); Lavit v. Superior Court, 839 P.2d 1141 (Ariz. 1992); Bruce v. Byrne-Stevens, 776 P.2d 666 (Wash. 1989); Kahn v. Burman, 673 F.Supp. 210 (E.D. Mich. 1987).

17 *See* 460 U.S. at 332 (citing Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 470 (1909)).

18 Posner, *Economic Approach*, *supra* note 7. *See also infra* text accompanying notes 82-92.

19 *See infra* text accompanying notes 82-92.

commercially available operate in a traditional market when competing for customers, and they also perform in another market-like context: the courtroom. It is in this second "market" that experts pitch ideas and stories to finders of fact. In any exchange—whether dealing with information or goods and services—distrust leads to higher costs. A judicial system in which experts are advocates while portrayed as independent is similarly costly. By "cost," I mean a true social cost in that resources are consumed without creating beneficial outcomes.

Although Part II discusses a number of costs, as a general matter, all of these costs are either "form-related" or "substance-related." By "form-related," I mean the costs associated with finding the "best actor" to tell the client's story. This could also be viewed as influence based on the institutional as opposed to the intellectual authority of the witness.²⁰ By "substance-related," I mean the costs associated with biased, misleading, and inaccurate expert testimony. There is an interaction between these two types of costs. For example, it may be more effective to have a Nobel Prize winner present a very biased opinion than to have a lesser-known economist tell the truth. The Nobel Prize winner's effectiveness is due to the authority the award confers on the expert, regardless of the validity of the expert's testimony. In effect, this "authority message" can be like static in that it interferes with an assessment of the substance of what is being said.²¹

In Part III, I examine contemporary efforts to control these costs. In the context of one of these, "the adversarial system," I return to and criticize Judge Posner's analysis. I also focus on unofficial sanctions by judges and various common law measures that have evolved to address the costs of the system.²² The overall analysis suggests that the currently existing control measures are incapable of substantially containing the social costs of experts.

Finally, in Part IV, I offer two proposals, both of which have the potential to lower the costs of the expert witness system by treating those who testify for pay like other businesses.²³ First, I propose reducing form-

20 See generally Charles W. Collier, *Intellectual Authority and Institutional Authority*, 42 J. LEGAL EDUC. 151 (1992).

21 Perhaps a better analogy is that it amplifies conclusions that are, in fact, not well grounded.

22 See *infra* Part II.B.1. Expert witness immunity is another case of confusing form and substance. The "form" in this instance has to do with the process of testifying. The substance of this type of testimony, however, is no different from any other commercially available service.

23 By way of full disclosure it seems important to reveal my own experience and perspective. As a law professor who teaches antitrust law and has a Ph.D. in economics, I have been asked to serve as an expert witness on thirty to forty occasions over the past twenty years. The time spent has been roughly equally divided between plaintiffs and defendants. On many occasions, I have indicated to the attorney inquiring about retaining me that I could not on good faith testify in a manner that would be beneficial to his client. I have seen many expert reports by highly regarded economists that would not be accepted to even the lowest ranked professional journal.

related costs by decreasing the emphasis on an expert's institutional authority. This is analogous to eliminating false, redundant or misleading advertising in a traditional commercial context. Second, I propose broadening the common law liability of experts under either a contract or tort theory as a response to substance-related costs. The analysis tracks the basic economic theory of externalities. In effect, expert witness misconduct results in costs to others. Any producer that does not incorporate these costs into its own cost-benefit analysis will tend to increase the quantity of production because he or she has not internalized the full cost. In the case of experts, this means a higher quantity of biased or misleading testimony. In fact, immunity for experts who offer biased testimony is no different than awarding a subsidy from those harmed but unable to recover. It is unlikely that much progress can be made until there is a reconceptualization of experts and standard contract and tort law are applied to their activities.²⁴

Before beginning, several observations, clarifications and disclaimers are in order. First, it is important to recognize the relationship of the analysis to *Daubert v. Merrill Dow Pharmaceuticals*,²⁵ which addresses many of the concerns expressed in this Article.²⁶ *Daubert* permits a trial court judge to exclude certain expert testimony. The *Daubert* two-part standard for expert testimony is laudable, albeit somewhat difficult to apply. First, the court must determine whether the offered testimony is based on scientific knowledge.²⁷ The court must then determine whether the testimony is likely to assist the trier of fact.²⁸ *Daubert*, however, falls well short of controlling the costs experts can impose on the system and the parties. For example, the process of excluding the testimony of even the most biased expert under *Daubert* can be expensive. In addition, the expert who survives a *Daubert* challenge may ultimately be undermined on cross-examination. If this happens, the parties incur yet another level of costs. Moreover, *Daubert* does not respond at all to the costs imposed on those who unknowingly retain a dishonest or over-zealous expert. For

Some of what the reader will find in these footnotes are anecdotes drawn from my own experiences. While I cannot claim as a matter of empirical truth that these anecdotes are representative, in no instance have I recounted an experience unless I have heard from at least one other person that he or she has had a similar experience.

24 See *infra* Part III.

25 509 U.S. 579 (1993).

26 This Article does not undertake a detailed analysis of *Daubert*, but extensive discussions can be found elsewhere. See, e.g., Sofia Adroque, *The Post-Daubert Court: "Amateur Scientist" Gatekeeper or Executioner?*, HOUS. L., March/April 1998, at 10; Michael H. Gottesman, *Admissibility of Expert Testimony After Daubert: The "Prestige" Factor*, 43 EMORY L.J. 867 (1994); Marilee M. Kapsa & Carl B. Meyer, *Scientific Experts: Making Their Testimony More Reliable*, 35 CAL. W. L. REV. 313 (1999); Edward E. Stevenson, *Admissibility of Expert Testimony After Kuhmo Tire*, 28 COLO. LAW. 73 (1999).

27 509 U.S. at 592.

28 *Id.*

example, the party retaining an expert has a great deal to lose if the expert, by testing the limits of the *Daubert* standard or by testifying in a manner inconsistent with prior testimony, is ineffective. Despite these shortcomings of *Daubert* as a cost-reducing mechanism, its general guidelines are important and will re-enter this analysis when the Article presents possible solutions.²⁹

Second, the analysis here, for the most part, is economic. Many readers may be more comfortable with a more deontological basis for the positions taken.³⁰ However, a utilitarian based economic analysis may be a better fit for two reasons. An economic analysis of the problem helps focus on the commercial nature of expert testimony. Additionally, this type of analysis provides the least rigorous test of whether the status quo is acceptable. If the status quo cannot pass the economic test, it is hard to imagine it passing based on a theory of rights or duties.

Third, it is difficult to separate the involvement of attorneys from that of experts in creating the current situation. Here again, it is useful to refer back to the substance-form dichotomy. On the substance side, attorneys are quite capable of withholding large sums of money from experts who are not cooperative. And, attorneys will shop around for an expert to provide testimony that other experts have declined to give.³¹ If the search for an expert is prolonged, the attorney is arguably offering a bribe to a fact witness. On the other hand, no attorney can legally force an expert to testify in a manner that is inconsistent with his or her good faith beliefs. Moreover, for attorneys, zealous representation of a client is required. For the expert, "zealous representation" is flatly inconsistent with what he or she purportedly brings to the process.³² Thus, as far as the substance of what is said, attorneys probably deserve more leeway than the experts themselves.

On the form side of things, attorneys can use experts for purely tactical reasons, like raising the costs of the litigation, and select experts on the basis of appearance, personality, and status, rather than on the basis of substantive quality.³³ The attorney is in charge of producing, directing and

29 See *infra* Part III.B.1.a.

30 Such an approach is sketched out briefly in Part III.B.2.a.

31 See Graham, *supra* note 13, at 84-88 (discussing the "Saturday Night Expert").

32 One might see this in terms of supply and demand with attorneys acting as demanders of opinions and experts acting as the suppliers. From this perspective they may seem equally responsible for what is produced and put into the "market." Still, the expert—like the manufacturer of a defective good—is better able to control the quality of the information he or she provides and is properly viewed as the more accountable party.

33 The possibly troubling aspect of the expert-attorney relationship is illustrated by reference to the preparation of affidavits. For example, several years ago I offered testimony in an antitrust case. I noted that an affidavit submitted by a highly respected economist on the other side of the case was highly argumentative and framed in terms of legal conclusions. Several years after the case, I met in a different context with the attorney who had represented the other side of the case and who had retained that expert. I remarked that the affidavit was remarkable with regard to the extent of

casting, and is thus responsible for the level of noise introduced into the process.³⁴ Attorneys are primarily responsible for raising the noise level by manipulating the expert's image.

Fourth, although some portions of what follows will focus on whether experts may be liable to their clients or to others on the basis of negligence, I do not want to mince words. While the negligence of an expert can surely be a problem, this article is more about knowing and purposeful misstatement and overstatement. Although a variety of terms and euphemisms are used, e.g., "bias," "conscious bias," "partisanship," more appropriate analogies may be to fraud and bribery. Many expert witnesses put forth bargained-for overstatements as their unbiased opinion even though they know or should know that these opinions would not be accepted for publication by even the lowest ranking journals in their fields. The standard I suggest for experts is to hold them "at fault" when they know or should know that their testimony would not be acceptable to peers. This includes expert testimony that, while not obviously dishonest, seems to be designed to conceal the truth from the jury.³⁵

Finally, it is important to recognize the interplay of competence and ethics in the context of experts. As discussed in an example set out below,³⁶ a court may suggest that an expert is both unqualified and biased. These two characteristics are not correlated. On the other hand, when combined, the effect can be powerful—the unscrupulous and highly competent expert is likely to be more effective at concealing bias than the unscrupulous but less competent expert. Still, the difference is important because the measures that might successfully address these two issues are different. This Article is focused on the problem of bias and ethics.

its legal analysis and absence of economic analysis. He smiled and replied, "Well I guess so! We just wrote it in the office and sent it to him to sign." I want to stop short of saying that this is always a corrupt process. After all, the expert has the final say on what he or she signs. On the other hand, once a document has been drafted by someone else, it is exceedingly difficult to regain "control" of that document so that it fully reflects both your conclusions and your tone.

In addition, there is ample evidence that attorneys try to influence expert opinions and their presentation. See Anthony Champagne et al., *Expert Witnesses in the Court: An Empirical Examination*, 76 JUDICATURE J. 5 (1992).

34 Even this is not so clear cut. Using again the analysis of supply and demand, the attorney is the demander of these static producing attributes and the expert supplies them. The expert can refuse to testify altogether, but to the extent the attributes have come to him or her through natural career development, it is hard to control their exploitation. On the other hand, the person who seeks to enhance his or her market value as an expert witness through the acquisition of image-enhancing qualities—membership and offices in profession associations, membership on prestigious editorial boards, etc.—seems more responsible for the costs created. Moreover, experts and potential experts are hardly helpless in the process. The expert witness industry has spawned a number of self-help products. See FRANK J. MACHOVEC, *THE EXPERT WITNESS SURVIVAL MANUAL* (1987); JACK V. MATSON, *EFFECTIVE EXPERT WITNESSING* (1999).

35 This follows from the supposition that a report presented to peers of an expert would not be regarded as adequate if relevant information were deleted.

36 See *infra* text accompanying notes 101-07.

I. The Social Costs of Expert Witnesses

Experts can give rise to a number of categories of social cost. In a sense, these are the costs of a lack of regulation, including traditional common law regulations. This lack of regulation means that the system permits and, at times, rewards well-concealed bias. Litigation can be analogized to behavior in conventional economic markets, and I begin my analysis by detailing this comparison. I am aware that for some this analogy may be offensive—too “Chicago” in its style—and I do not want to take the analogy too far. Nevertheless, even if the justice system is about loftier values such as fairness and morality, it makes sense to explore whether these goals can be achieved in a less costly fashion.

The analogy to traditional markets fits in a number of ways. First, both a party to litigation and a seller in a market are in the “business” of influencing decision makers—opposing counsel,³⁷ the judge, and jurors on the one hand, and consumers on the other. The attorney “pitches” his version of the facts or the law much like a salesperson pitches his or her product (and, it is worth adding, for the same reason). In fact, practitioner-oriented literature reflects the fact that attorneys shop for experts who are as good at salesmanship as they are at analysis.³⁸ Second, in conventional markets, a competitor’s goal is to gain consumer loyalty with the hope that those consumers will remain loyal even if prices are increased. In short, the objective is to gain some measure of market or monopoly power. In the context of litigation, there is a parallel concept: the measure of power is how solidly jurors identify with one side or the other and how much an attorney can convince opposing counsel of that likelihood.

Third, and perhaps most important, efforts to gain market power³⁹ can involve the use of promotional devices. Advertising—information supplied to the decision maker—can be useful to consumers and increase the likelihood of “right” decisions, or it can be misleading and therefore decrease the likelihood of “right” decisions. It is difficult to find a principled distinction between advertising and its possible social costs and much of what goes on with the use of expert witnesses.⁴⁰ Like the

37 It may seem odd to include opposing counsel with jurors as part of an analogy, but throughout a dispute a great deal of emphasis is placed by one side on convincing the other side that it is likely to lose. The retention and use of experts is an important part of this effort.

38 See *supra* text accompanying note 12. See also Michelle Durham, *How to Find the Experts: Winnowing the Expert Hunt*, LEGAL TIMES, July 22, 1996, at S37; Lori Tripoli, *Developing Expert Ways to Manage Expert Witnesses*, 16 PRODUCT LIABILITY & STRATEGY, Oct. 1997, at 8.

39 This is not to say that all expenditures that lead to increases in market power in traditional markets or in influencing jurors are wasteful. Efforts to become the dominant seller in a specific product line by perfecting one’s product produce a social benefit. Similarly, efforts to honestly inform the jurors of the technicalities of determining market power or calculating damages or the proper procedure for delivering an infant provide valuable assistance.

40 One important distinction is that advertising and misinformation in conventional market

testimonial form of advertising, the expert who testifies is paid to convince decision makers of the validity of a claim. In effect, experts represent the Madison Avenue of litigation and the "advertising" may be truthful and useful or misleading and give rise to a number of social costs.⁴¹

A. Canceling Effects

The most obvious cost of expert witness bias is that multiple experts will be used to oppose each other with the effect of canceling each other out.⁴² Thus, in many instances one side may present an expert who says A and the other presents an expert who says B. If together the testimony does little or nothing to move the jurors closer to the truth, there is a net loss—resources expended with no advancement in the "truth-seeking" objective. This social cost may seem endemic to any use of experts, especially when there is room for honest disagreement. But the room for honest disagreement is probably far narrower than the widespread disagreement between experts at trial would suggest. For example, suppose that in fifty percent of the cases in which expert testimony is relied upon, the same issues, if addressed in a professional journal, would result in no significant debate. In those instances, an expert who is willing to opine in a manner that is inconsistent with the accepted consensus view in the profession forces opposing counsel to present an opposing expert or to take his or her chances by relying solely on cross-examination.

In the case of canceling-out effects, the market analogy can be pushed one step further. In the marketplace for goods and services, courts make a distinction between "competition on the merits" and competitive efforts designed simply to make the efforts of a competitor more difficult. Competition on the merits entails describing the quality of competing products and allowing buyers to make a more informed decision.⁴³ On the

are likely to be subject to correction over time through counter-advertising, word of mouth and the fact that consumers may substitute new suppliers. "Advertising" in the judicial context is subject to narrower time constraints and is unaffected by "word of mouth" or "repeat buyer" influences.

41 Traditionally monopoly is said to result in higher prices, lower output, and a "dead weight" loss. In economic circles, it is said that the amount one is willing to spend to gain a monopoly is equal to the benefits derived. That is, one does not spend \$1,000,000 in advertising in a market in which the expected profits from the sales created by that advertising are less than the cost. And, as economists as well as Richard Posner point out, one of the costs of monopoly is the cost of the resources incurred to gain market power or monopoly status. See Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975). Not all of these can be regarded as a social costs. For example, a higher price alone is simply a transfer of wealth from consumers to shareholders.

42 See Posner, *Economic Approach*, *supra* note 7, at 1539. See also Becker, *supra* note 11, at 7 ("Rest assured that no matter how well-credentialed and impressive your expert is, and no matter how convincing your expert's testimony is to you, your opponent will come up with an expert to contradict yours.").

43 In commercial markets a fair amount of "puffing" is also permitted. See JAMES L. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 394-95 (3d ed. 1988). In the context of expert witness, the same sort puffing would be the equivalent of biased or exaggerated testimony.

other hand, a great deal of sales effort is competitive but not designed to make the consumer better informed. This type of advertising simply raises the costs of competing. In the case of expert witnesses, competition on the merits occurs when there are different opinions that are honest and supportable. Although the views seem to cancel each other out, these are instances where there exists more than one "truth" and it is for the jury to sort out the better "truth." The sorting out is best undertaken when the jurors can compare the views of the experts. On the other hand, the use of experts, like advertising in conventional markets, may simply raise the cost of staying in the game.

Interestingly, the canceling-out effect may not be worse than a process in which experts do not cancel each other out. For example, consider the observation of one attorney on the importance of offering an expert: "[M]y instinct in the future is to put someone on to say that the defense's expert does not have a clue . . . just for the mere purpose of avoiding a juror who says the defense had an expert and the other side didn't."⁴⁴ In this context, the assumption is that it is not simply the testimony of the expert that the juror finds persuasive, but the fact that an "expert" appeared at all. What this suggests is that canceling-out is only the second worst outcome. Without it, the risk of a wrong decision may actually increase.⁴⁵

B. *Wrong Decisions*

Related to the canceling-out effect of experts is the possibility that their use may increase the probability of wrong decisions. I do not mean to engage in a metaphysical discussion of whether there are right and wrong answers, but many issues do have answers that are sensible to most people. These might include questions like the following: Was the physician negligent? Did the defendant have market power? What is the fair market value of the property? In these instances, most would agree that there is a social cost to wrong answers. For example, whether or not the teachings of law and economics are believed, holdings about liability do influence subsequent economic decisions. A "wrong" tort decision may result in the losing party taking actions to avoid losses even though the winning party could have avoided the losses more cheaply.⁴⁶

Wrong decisions do not occur only when experts battle it out at trial with one side clearly prevailing. There are also instances where the wrong decisions are the products of compromise. This can arise when a jury splits

44 *Expert Witnesses Found Credible by Most Jurors*, *supra* note 9 (quoting Abe Laeser).

45 This would turn on the cost of jury error.

46 For example, auto manufacturers might not install safety devices that are cost-justified or physicians may not attempt to avoid mishaps that they are in the best position to control.

the difference. For example, in a simple contract dispute, one expert may testify that the damages were \$15,000 and the other that the damages were \$1,000,000. If one expert has slanted his testimony and the other has not, a split-the-difference decision would not be the right result.⁴⁷ This could occur in contract, tort, and antitrust disputes. It could also occur in a criminal case in which the jury is permitted to select among a number of levels of culpability. Of course, if both experts are biased and the jury splits the difference, the outcome may be the correct one, but, as noted above, this process is far more costly than it needs to be.

Additionally, in some instances the "wrong" decision may be no decision. Thus two parties may have at the center of their dispute an important legal issue. If the dispute is settled before a court can set out the correct rule or at least clarify the law, the process has in a sense not produced the "best" outcome. The critical factor that will influence an attorney and her client's decision whether to settle is their level of confidence that they will prevail if the case is tried. If experts can, in effect, be produced to support any position, an extra degree of uncertainty is added that will reduce confidence in success.

C. *The Distrust Externality*

An additional social cost of expert testimony might be called the "distrust externality." This externality has two layers. The first layer is simply that biased experts can infect the system so that the testimony of the most careful and trustworthy experts is ignored. In effect, the business of expert witnesses may cause the trier of fact to have misgivings about all experts although such distrust is often unwarranted. The irony here is that even honest efforts by experts are a type of social cost in that honest testimony that is disbelieved is a waste.⁴⁸ It would be wrong to attribute

47 The gamesmanship that takes place between experts in terms of attempting to offset each others' testimony can be illustrated by an anecdote drawn from personal experience. Some years ago I was retained to testify on the damages in a contract breach case. I was idealistic and did my best to come up with the "right" answer. My answer was in the range of \$1,000,000. After I had done my work I was asked to review the estimate of the opposing side's expert. That expert, employed by the litigation support division of a prestigious accounting firm, came up with an estimate of \$10,000.

I was stunned by the blatant dishonesty. I had yet to fully understand the game. I continued to fume after the trial even though the jury had accepted my numbers. A few weeks later, a student showed up at my doorstep. He said, "My Uncle Phil says hello." The name did not ring a bell so I asked who Uncle Phil was. He said, "Oh, he was the expert on the other side of that case you testified in a few weeks ago." I got ready to blast the student with what I really felt about his Uncle Phil. Before I could, the student said, "Uncle Phil said you were tremendous and did a spectacular job." Remember, this is the same Uncle Phil who had testified, under oath, that I had made close to a \$1,000,000 mistake in my calculations. Put differently, he had testified that I was either a crook or incompetent. But in terms of playing the "game," which had nothing to do with providing the jury with accurate information, I had done a wonderful job.

48 In his writings, Judge Posner indicates that the adversarial system may serve to deter irresponsible expert testimony. See Posner, *Economic Approach*, *supra* note 7, at 1537. As will be

this distrust of the process to experts alone. It is part of a generalized distrust of lawyers and courts that is in part based on reality and in part based on popular images of lawyers and the judicial system. But the more important point here is that the unscrupulous expert witness produces an externality of distrust that extends beyond that expert's own testimony.

The second externality is more diffuse. There are costs of acting as an expert witness. There are obvious out-of-pocket costs plus the opportunity cost, i.e., the value of activities forgone. An additional cost to some potential experts may be the discomfort of entering into a fray that seems to have few rules that encourage one to stick to an honest and unbiased effort. This discomfort means that valuable resources are not drawn into the expert witness business or that a premium must be paid to draw in those most offended by what is tantamount to a bare-knuckled brawl.⁴⁹ This effect seems to work in only one direction.⁵⁰ That is, the existence of bias and overstatement in the process is unlikely to make it more attractive to many or any potential experts—except those who may exacerbate the situation—and will make it less attractive to those who find the rough and tumble expert witness process not to their liking.

D. *The Misallocation of Expertise*

One of the fundamental teachings of microeconomic theory is that producers who are able to avoid some of the costs of production of a good or service are likely to offer more than they would offer if they fully internalized the costs. The logic is quite simple. If a producer avoids some costs of its activity, whatever is being produced will seem to be more profitable and this, in turn, will mean more resources are drawn into the production of that good or service.⁵¹ Since the endeavor of producing and selling expert testimony is one in which producers do not internalize all the costs of their efforts, there would be an artificially high attraction to that business.⁵² The profitability of selling expert witness services is likely to

noted, I am less optimistic. See *supra* Part I. I believe Judge Posner confuses the goal of finding the "correct answer" with the goal of convincing a juror that a specific fact finding is correct.

49 This may be similar to the analysis suggesting that "lemons" in the used car market can drive out good cars. See George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

50 Although I cannot provide an empirical basis for the existence of this externality, an informal survey of colleagues who have acted as experts indicates that they all dread the prospect of testifying in a context in which the opposing expert is likely to be biased. In a sense, this dread can be equated with a cost of their involvement. Related to this is the also empirically unverified point that the "business" of being an expert witness at least until recently was viewed by some as a less than dignified activity. See generally Michael J. Mandel, *Going for the Gold: Economists as Expert Witnesses*, J. ECON. PERSP., Spring 1999, at 113, 120.

51 Technically, this is allocatively inefficient.

52 I do not mean to suggest that the realm of scholarship is entirely separate from that of research associated with preparation for testimony. There are, no doubt, instances in which experience

have the effect of drawing academics away from scholarly work and toward expert witness activities.⁵³

This misallocation also occurs when a producer is unable to internalize the gains from his or her efforts. In effect, the activity may be beneficial, but if the producer does not receive benefit, production will not be at its most efficient level. Judge Posner explains how this happens. First, suppose the academician produces research that has a certain value but the academic's salary does not fully reflect that value.⁵⁴ In addition, suppose the value of the expert's testimony is not as high as the value of the academic research but the academician receives higher compensation as an expert. Obviously, the academician will be lured into the less valuable activity.⁵⁵

Judge Posner adds a slight twist to this by noting that there is a value to accurate judicial outcomes and that the expert may not be compensated for that value any more than he or she is for the full value of academic efforts. In his view, the payment to the academician as both a scholar *and* an expert witness will be less than the value actually produced by these activities. In addition, Posner thinks there may be a tendency to understate the actual value of accurate judicial outcomes. If so, the net loss associated with the flow of intellectual effort out of academia may be less than what one might initially suppose.

While Judge Posner's social-costs-may-not-be-as-great-as-one-might-think reasoning makes sense in some respects, it seems incomplete in others. He properly considers the brain and effort drain but seems to exaggerate the value of what experts actually produce and sell, as well as the externalities produced. The problem is that experts only assist in achieving "accurate" results if most experts, most of the time, deliver unbiased opinions and jurors believe them. As soon as an expert begins to slant, shade, or engage in "puffing," *or jurors believe that is what is going on*, the analysis changes and the contribution of the expert to reaching the "right" judicial outcome becomes questionable.

In effect, Judge Posner seems to miss the commercial nature of the expert witness business and what is actually being sold and the "cost" side of the analysis. The expert is not retained to achieve an "accurate" outcome but rather to be effective in achieving an outcome favorable to the client. If the standard is accuracy, the expert who engages in fudging, puffing, exaggerating, shading, or any kind of deception is producing a

as an expert witness increases the productivity of academicians.

53 See Mandel, *supra* note 50, at 118; Posner, *Economic Approach*, *supra* note 7, at 1540.

54 If these benefits were "captured" by the researcher, then the net benefits of scholarship and of expert witness activities would be fairly compared.

55 See Posner, *Economic Approach*, *supra* note 7, at 1540. The number of academicians available for expert witness service provides some support for this.

defective product. Thus, rather than asking whether the expert has internalized the benefits of his or her testimony, the proper question may be whether he or she has internalized the external costs of that testimony. The answer is that, unlike producers in conventional markets, experts are rarely, if ever, personally accountable for “defective” merchandise.⁵⁶ In fact, rather than incurring costs for selling misleading information, an expert’s income may depend on it since it is effectiveness that pays the bills.

Thus, instead of assisting courts to reach accurate outcomes, even honest experts who are discounted are making it more costly to achieve accurate outcomes. If academics-as-experts make resolving judicial matters more costly and complicated than it needs to be, their shift from academia to the courtroom is costly indeed. It is hard to see any social benefit in a movement of academics from scholarly efforts in which bias has relatively little value into a market in which bias is highly sought after unless that movement is for the purpose of combating the dishonesty of others. Furthermore, even if there are occasions in which experts make it less costly to reach accurate outcomes, it seems likely that this would occur more often if experts were more accountable.

The analysis so far may suggest that the concern is only that academicians will spend too much time reading depositions, preparing for testimony, writing expert reports, etc. But the lure of artificially high profits for expert witnesses does not simply mean that scholars are no longer to be found in their offices. The actual impact may be far subtler. For example, it has been suggested that the academic-as-expert might alter his or her research agenda as a means of becoming more attractive to attorneys.⁵⁷ This raises an obvious social cost issue if the value of the academic’s scholarly pursuits uninfluenced by the lure of expert witness profits would ultimately have greater social value. But there is also an ethical issue. If an academician’s research agenda would look different if there were no moonlighting opportunities, then the researcher may be shirking his or her academic duties in order to pursue more financially rewarding ones. Or it may be that the researcher is, in effect, subsidizing the accumulation of human capital as an expert and that the cost of that subsidization is the benefit of the research that is neglected.

Another possibility is not just that the researcher will dedicate herself to areas of inquiry that make her attractive as an expert but that she will begin to shade the results of both the research relevant to her fields of testimonial expertise as well as to other fields. This may seem slightly far-fetched, but every experienced expert witness knows that she is likely to

⁵⁶ It is important to note that, due to the distrust externality, even the most conscientious experts may simply gum up the works. The high distrust of experts by jurors supports this.

⁵⁷ See Mandel, *supra* note 50, at 118.

be questioned by opposing counsel on any materials she has written that are remotely related to the case.⁵⁸ This factor may provide an incentive to take greater care. On the other hand, it may also mean that conclusions are avoided that can be made to appear inconsistent under cross-examination with a position that it would be useful to take as an expert witness.⁵⁹ If this occurs, even the academic's work in professional journals is tainted.

E. Institutional Authority and the Expert Witness Package

The final cost is associated with the process of packaging and responding to the packaged expert. These are nearly exclusively form-related costs. The most important type of packaging relates to institutional authority. An expert brings to the courtroom both intellectual authority and institutional authority.⁶⁰ Intellectual authority is "exerted by arguments that make their way simply by virtue of a superior rationality and do not depend for their impact on the lines of power and influence operating in an institution."⁶¹ Institutional authority, on the other hand, is "the non-intellectual influence exerted by social, political, cultural, historical, legal literary, educational, religious and other institutions."⁶² In very simple terms, one can influence others by virtue of the consistency and logic of the arguments she makes, or one can have influence by virtue of the institutions with which she is believed to be associated.

When experts are used, the reliance on institutional authority is pervasive. Higher levels of institutional authority draw a premium in the market.⁶³ Its value is attested to by the fact that expert witness fees for economists, for example, may range from \$125 per hour to many multiples of that.⁶⁴ The question then is what accounts for this difference. One might

58 A similar possibility applies to the quality of the testimony itself. An expert looking to maximize long term earning may be less forceful about her opinions for fear that they will render her less marketable in the future.

59 While I again can offer no empirical evidence that this occurs, I can provide an anecdote. Once when assisting another professor with a manuscript he was preparing, I noted that a particularly useful example that I had read in an earlier draft had been deleted. Upon further inquiry, he told me that an attorney who had engaged him for expert testimony asked him to delete it because it could work against his efforts in a current case. The expert/academician accommodated him.

60 See generally Collier, *supra* note 20; Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L. J. 191 (1991) [hereinafter Collier, *Use and Abuse*].

61 Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1342 (1984). See Collier, *Use and Abuse*, *supra* note 60, at 206-11. In the context of expert witnesses, institutional authority has also been labeled "paramessage." See Paul Rosenthal, *Nature of Jury Response to Expert Witnesses*, 28 J. FORENSIC SCI. 528, 529 (1983).

62 Collier, *supra* note 20, at 152.

63 One commentator notes that an attack on the expert's institutional authority can backfire. See Tripoli, *supra* note 38, at 8.

64 I base this in part on personal knowledge gained from deposition testimony, but the popular press also notes that expert witness fees can be quite rewarding for those with the most impressive credentials. See David Greising, *supra* note 1. The range for physicians in malpractice

claim that some opinions are better and more "correct" than others and, therefore, more costly. This hardly seems likely; the higher prices are almost certainly attributed to differences in authority.⁶⁵ Thus, the economist who graduated from a department of agricultural economics and is privately employed is priced several notches in the market below the economist who graduated from an Ivy League school and is employed by a prestigious university.⁶⁶

Although institutional authority may not be wholly useless in all contexts,⁶⁷ it has the capacity to produce a type of noise that distracts from the substantive testimony. This can happen in two ways. First, credentials and the institutional authority that they supply may distract triers of fact from fundamental weaknesses in the expert's methodology. The hardworking and careful assistant professor from a non-elite school may be less convincing than the Nobel Laureate from an elite school solely because of the differences in institutional authority. Thus, institutional authority hampers the ability of the jurors to assess ideas. Perhaps more importantly, there is also the danger that institutional authority will be used as an indicator not just of technical competence but also of honesty. A supposition that an expert who graduated from an elite school or who has published widely in prestigious journals has higher ethical standards is completely unsupportable.

This is not to say that accomplishment is not a useful way of determining whether someone's opinion should be relied upon. Accomplishment, however, is distinct from institutional authority. Earning a Ph.D. from an accredited school is an accomplishment and probably sufficient to establish that an expert is capable of assisting the trier of fact in some areas. Conducting research in a field, teaching a subject, or possessing years of experience working in a field are arguably more likely to be correlated with the capacity to form a reliable opinion than institutional authority. Similarly, integrity and institutional authority are different matters.⁶⁸ Yet it seems clear that experts sell and attorneys buy institutional authority as a way of creating a more favorable view of the

actions is reported in the range of \$200 to \$1500 per hour. Scott Olson, *In re: Expert Witnesses*, IND. LAW., Mar. 19, 1997, at 18.

65 No doubt some of the difference is also the result of regional differences in rates and information imperfections. For example, a newcomer may not be aware of what the market will bear in terms of expert witness fees.

Based on surveys of what jurors find important, paying a premium for institutional authority may be money well spent. See Daniel W. Shuman et al., *An Empirical Examination of the Use of Expert Witnesses in the Courts—Part II: A Three City Survey*, 34 JURIMETICS J. 193, 200-01 (1994).

66 See *infra* text accompanying notes 70-74. See also MACHOVEC, *supra* note 34, at 76-78.

67 Institutional authority may be a signal of intellectual authority and a relatively low cost method of determining whether an individual possesses the minimal qualifications to offer an expert opinion.

68 See Gross, *supra* note 13, at 1178. Of course, possessing the "capacity to assist" is no assurance that that capacity will be employed in an unbiased manner.

expert's substantive efforts and the expert's objectivity.⁶⁹

To understand the importance of institutional authority, compare the ways in which two expert economists are described in a 1997 opinion.⁷⁰ One expert is "the president and sole shareholder" of a consulting firm where "ninety percent of [the] firm's work is for lawyers or in the litigation context."⁷¹ He also has a "Ph.D. in Agricultural and Applied Economics" and "has published a total of seven articles in his entire career . . . two of which were published in law reviews and not subject to peer review by economists."⁷² The other expert, on the other hand, has "served as a professor for 24 years," "earned a . . . Ph.D. in Economics," "has authored over 100 articles," "serves on the editorial board of three economics journals," and "devotes only seven to five percent of his time to consulting in litigation."⁷³ In effect, this detailed description of credentials and economic dependence suggests that there are differences in competence and standards of independence.⁷⁴

Even when the highly credentialed "authority" loses, a more lenient standard appears to have been applied in evaluating her testimony. For example, in *Rosen v. Ciba-Geigy*,⁷⁵ a case in which Judge Posner upheld a lower court's decision to exclude the testimony of a cardiologist under a *Daubert* standard, he repeatedly deferred to the expert's credentials. Thus, "since [the expert] is a distinguished cardiologist [, his opinion] is worthy of careful consideration."⁷⁶ In a close case where experts on both sides appear to have been scrupulous in their investigation, it may be that the more experienced expert should get the nod. What is troublesome about this type of response in this particular case is that the expert in question had provided no scientific basis for the opinion given. The expert's

69 And since greater institutional authority is expensive, the process favors the litigant with the deeper pocket.

In one self-help manual for expert witnesses, the author presents an "Expert Witness Credibility Checklist," much of which consists of various forms of institutional authority. MACHOVEC, *supra* note 34, at 79-80.

70 *United Phosphorus, Ltd. v. Midland Fumigant*, 173 F.R.D. 675 (D. Kan. 1997). A parallel description of the two experts without quite as much editorial comment is in found in *In re Aluminum Phosphide Antitrust Litigation*, 893 F. Supp. 1497 (D. Kan. 1995).

71 173 F.R.D. at 679.

72 *Id.*

73 *Id.*

74 Whether the implication is that "professional experts" tend to be less competent or less independent or both, there is no apparent logic behind this suggestion. For example, the fact that the second expert devotes only five to seven percent of his time to consulting does not at all mean that he does not double his teaching salary by engaging in the consulting. Whatever temptations may exist to shade one's analysis or to do superficial work would seem to be equally applicable to the moonlighting college professor as they are to full-time experts. At an anecdotal level, my own experience suggests that there is no correlation between competence or integrity and whether one is a moonlighting college professor or full-time expert.

75 78 F.3d 316 (7th Cir. 1996).

76 *Id.* at 319.

credentials, rather than suggesting that his work deserved a careful look, arguably suggested that what was lacking was integrity.⁷⁷

The emphasis on credentials and the variation in expert witness fees suggest a broader multifaceted concern with expert witness packaging. The most desirable packages are characterized by 1) the willingness to express an opinion that is helpful, 2) institutional authority, 3) low levels of vulnerability to cross-examination and 4) testimonial moxie. The sense that qualities other than institutional authority are bought and sold can be captured by the marketing of self-help books to those hoping for careers as expert witnesses. These materials contain information ranging from that which is perfectly legitimate⁷⁸ to instructions on how to avoid making truthful concessions on cross-examination counter to the client's interest.⁷⁹ As one author notes in this regard, "Capitulation will make your career as an expert witness a short one."⁸⁰ While not overtly dishonest, these tactics are designed to ensure that the expert does not tell the "the whole truth" as a means of ensuring long term attractiveness to attorneys and to enhance earning power.⁸¹

II. Controlling Experts

The market for expert testimony is similar in many respects to conventional markets that rely on promotional efforts: Money and resources are used to influence a "sale." The promotion itself may or may not assist the trier of fact to make the "right decision." All markets, including that for expert testimony, tend to have policing mechanisms ranging from public regulation to private actions that shape participant

77 It is possible that Judge Posner simply has a soft spot in his heart for experts from the University of Chicago; the expert in *Rosen* was a professor at the University of Chicago. Similarly, after Judge Kocoras' blunt criticism of Robert Lucas, *see supra* text accompanying notes 2-5, Judge Posner reviewed the case on appeal and had very little negative to say with respect to Dr. Lucas. *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781, 786 (7th Cir. 1999).

78 Certainly there is nothing illegitimate about improving one's communication skills.

79 Possible resisting responses listed in one book include:

- A. Could you repeat the question?
- A. Could you rephrase the question?
- A. That question is too vague. Could you be more specific?
- A. I don't understand the question.
- A. The answer would require more study.
- A. That's a difficult question to ask without more information.
- A. That question demands that I make a whole series of assumptions.

MATSON, *supra* note 34, at 103. Other "self-help" books include DANIEL BRONSTEIN, *LAW FOR THE EXPERT WITNESS* (2d ed. 1999); and MACHOVEC, *supra* note 34.

80 MATSON, *supra* note 34, at 103. The advice of self-help manuals seems consistent with the insight of Professor Samuel Gross when he observes, "Lying is not the only way that a witness can deceive; it is probably not even the major way." Gross, *supra* note 13, at 1176.

81 Self-help books and general expectations about an expert's elusiveness may give rise to the question of whether the expert who surprises his employer by being completely forthcoming may have breached some form of implied warranty.

behavior. In the case of experts, four are important. The first is the adversarial process itself, embodied primarily by opposing counsel. The second is judicial action by means of the public exposure or exclusion of questionable testimony. The third is common law liability to the "friendly" or to the adverse party who has been injured as a result of the testimony. A fourth possibility is the use of professional disciplinary procedures against experts under the theory that sloppy or dishonest work violates ethical norms. All have some merit but all stop short of the goal of lowering social costs while maintaining the useful aspects of expert testimony.

A. *The Adversarial System*

As noted in the Introduction, Judge Posner has explored some aspects of the expert witness problem focused on here.⁸² He argues that a number of factors work to keep excessive partisanship in check. His analysis involves an important caveat that should be mentioned. He suggests that these factors are important in controlling experts in cases involving "area[s] in which there is a consensus on the essential and methodological premises."⁸³ In short, these factors are powerful when there is a single right procedure or answer.

With this in mind, Judge Posner lists four factors. First, since many expert witnesses are "repeat players," he suggests they have a financial interest in "preserving a reputation for being honest and competent."⁸⁴ Second, the expert who has written in professional journals is kept honest by the threat of cross-examination based on those publications. Similarly, the lack of publication in the relevant field, according to Posner, should serve as notice that the attorney was unable to secure the testimony of a more knowledgeable expert.⁸⁵ Third, the need to disclose one's evidence and subject it to intense scrutiny before testifying will discourage spotty work. Finally, knowing that the testimony will be subject to scrutiny under the *Daubert* standard will also create a disincentive to venturing too far

82 See Posner, *Economic Approach*, *supra* note 7.

83 *Id.* at 1536.

84 *Id.* at 1537. See also Graham, *supra* note 13, at 69-71; Gross, *supra* note 13, at 1175-79. Judge Posner suggests that even professors appearing as experts will be motivated to be honest because exposure to their academic colleagues would result in "heavy nonpecuniary costs." Posner, *Economic Approach*, *supra* note 7, at 1537. On the other hand, Professor Gross maintains that, "what an expert says in court is generally invisible and inaudible in her own professional world." Gross, *supra* note 13, at 1178.

An interesting account of a battle between academic experts that carried over into their academic lives can be found at Daniel Mendelsohn, *The Stand: Expert Witnesses and Ancient Mysteries in Colorado Courtroom*, *LINGUA FRANCA* Sept./Oct. 1996. The article suggests that well-known academician Martha Nussbaum, in the eyes of many scholars, offered testimony that did not pass the "laugh test." See *id.* Yet is hard to believe that even this highly publicized incident has had an effect on any of the participants' careers as academicians.

85 See Posner, *Economic Approach*, *supra* note 7, at 1537.

from accepted methodologies.⁸⁶

Obviously, Judge Posner is right about the existence of these influences. No expert wants to be exposed as a liar or be shown to have used a methodology that is not acceptable. But there are several limitations to his analysis. The first, as he notes, is that the controlling effects are less powerful when there is not a consensus view on the issue. In actual cases with unique fact patterns, there are few instances in which one theory will *seem* to be the only correct one. In fact, part of the purpose for calling experts is to demonstrate the lack of consensus. Second, all of these influences provide a great incentive to be particularly careful about concealing a lack of impartiality and the expert who is good at this may “repeat” as much as the honest expert. Third, Judge Posner seems to make an implicit assumption that the market within which experts operate is akin to a perfectly competitive conventional market in that information is readily available at low cost and that adjustments in the market are swift. For example, there seems to be a supposition in his analysis that jurors will listen to and fully comprehend when an expert has been effectively cross-examined. It seems just as likely that the aggressive questioning required to “out” a biased expert will actually have the effect of convincing the jury that the cross-examining attorney is a bully.

There is, however, a much more crucial misstep in Judge Posner’s analysis concerning the chain of causation. He argues that since experts want to be “repeat players,” they have an interest in “creating and preserving a reputation for being honest and competent”⁸⁷ and will therefore be impartial. The problem is the difference between actual impartiality and what the attorney seeks to buy from the expert, which is “effectiveness.” Thus, Posner’s analysis might be more accurate if it went like this: Experts want to be repeat players, and in order to be repeat players experts must be “effective.” This leads to the obvious question of whether effectiveness can be equated with impartiality. There are at least two reasons why it may not be. First, while it is critical at trial for the effective expert to appear impartial, it does not mean that he or she is impartial. For example, personal appearance,⁸⁸ personality,⁸⁹ the ability to clearly explain complex ideas,⁹⁰ and institutional authority⁹¹ are also correlated with effectiveness and, therefore, credibility, but not necessarily

86 But note how inconsistent this train of thought is with what is implicit in the materials discussed and cited above pertaining to how to be an effective expert by avoiding candor.

87 Posner, *Economic Approach*, *supra* note 7, at 1537.

88 See Rosenthal, *supra* note 61, at 529-30.

89 See Tripoli, *supra* note 38.

90 See Shuman et al., *Science in the Jurybox*, *supra* note 10, at 28-29.

91 See *supra* Part I.E. See also Ted Dunkenberger & Mark Kohorst, *Credibility and the Scientific Expert*, THE METROPOLITAN CORP. COUNS., Aug. 1998, at 28.

actual honesty.⁹² Indeed, the most effective expert may be the craftiest in terms of concealing a lack of impartiality.

Second, the real customers of potential effectiveness are attorneys purchasing expert witness services. Effectiveness in the view of attorneys is assessed not just on how the expert will stand up in front of the trier of fact but also on the basis of an issue that comes first procedurally—whether the expert’s testimony sufficiently creates an issue of fact that will permit the plaintiff to reach the jury. This prospect is a means of raising the stakes in settlement negotiations. The mantra of a plaintiff’s attorney to “get to the jury” may mean retaining an expert who may be biased. If the facts are consistent with the plaintiff’s theory of liability or damages, honesty may be permitted. On the other hand, if the facts do not entirely square with the plaintiff’s theory, the “effective” and, therefore, marketable expert is one who is skilled at massaging and recasting the facts in a way to make them appear to fit the chosen theories.

B. *The Judicial Fine*

1. “Outing” the Expert

Judicial efforts to control experts generally fall into two categories. For the most part, both deal with the admissibility of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals*⁹³ and the more recent *Kuhmo Tire Co. v. Carmichael*.⁹⁴ One approach is a more or less straightforward application of *Daubert* involving scrutiny directed primarily at the expert witness’s methodology. Any suggestion that the witness is biased or has not acted with integrity is either absent or is left to the reader. This particular judicial reaction is not the primary focus of this section. Under the second approach, the court more or less “undresses” the expert by revealing information about the person or the process of retaining him or her or the methodology that suggests that the expert’s opinion is not an honest one. There can be an element of ridicule in this approach.

Although the generalization is a rough one, these two approaches can be seen as ends of a continuum. At one end is criticism directed solely towards the expert’s competency. At the other are criticisms directed solely at the expert’s character.⁹⁵ Thus, an opinion that goes no further

92 Evidence also suggests that race and gender may play a role in the perceptions of jurors. See Amina Memon & Daniel W. Shuman, *Juror Perceptions of Experts in Civil Disputes: The Role of Race and Gender*, 22 LAW & PSYCHOL. REV. 179 (1998).

93 509 U.S. 579 (1993).

94 526 U.S. 137 (1999).

95 Character commentary is likely to be cloaked in the language of bias.

than excluding expert testimony because it does not comply with *Daubert* standards is consistent with a view that the expert did not come to his or her opinion in a competent manner and was honestly mistaken. On the other hand, an opinion that cites major errors in methodology or discusses the actual personality of the expert can be seen as an attack on the honesty of the expert. Opinions at this end of the spectrum seem especially designed to create disincentives for experts to be biased. This is not to say that attacks on competency are not useful as well, but they are far less likely to have an impact on the future honesty of all experts.⁹⁶ Instead, they are more likely to make an already honest expert more careful in the future.

As an economic matter, admonitions by judges that go to integrity can be seen as “fines” since they will likely have an impact on the expert’s income. An attorney will be less willing to retain an expert who has experienced “*Daubert* problems”⁹⁷ or who has had his or her integrity questioned. Thus, demand for the expert’s services will fall. A reaction by that expert or others may be to avoid further such judicial “fines” by being more impartial.

In practice, judicial commentary on character can be sharply personal or simply lay bare a methodology that is obviously biased. And, in some instances, a court may do some of each. Judge Kocoras’s criticism of Robert Lucas’s testimony in the *Brand Name Prescription Drug Litigation*⁹⁸ may set the record for the harshness and directness of its attack on an expert’s character.⁹⁹ Whatever impact it may or may not have on future testimony by Dr. Lucas, it seems likely that even the most craven expert witnesses would be more hesitant about overstating his or her

96 The impact of *Daubert* and, more recently, *Kuhmo Tire* has been reviewed in a number of places. Volume 15 of the *Cardozo Law Review* (1994) contains a series of articles as part of a symposium entitled, “Scientific Evidence after the Death of Frye.” See also Stevenson, *supra* note 26.

97 I use the notion of a “*Daubert* problem” as any decision by a court to exclude an expert’s testimony.

98 *In re Brand Name Prescription Drugs Antitrust Litig.*, 1999 WL 33889 (N.D. Ill. 1999). See *supra* text accompanying notes 2-5. Also found in the *Brand Name Prescription Drug Antitrust Litigation* is Judge Kocoras’s review of the work of Jeffrey Perloff and Dean Wesly Magat as “virtually worthless” and “absurd.” *In re Brand Name Prescription Drugs Antitrust Litig.*, 1996 WL 167350, at *22-23 (N.D. Ill. 1996). In forming opinions on the issue of whether the manufacturers of brand name prescription drugs had conspired with their wholesalers to fix prices, the experts had evidently relied on materials supplied exclusively by those retaining them. In addition, the testimony, according to the judge, revealed “ignorance of one of the most fundamental characteristics of the brand name prescription industry.” In addition, the late retention of Perloff after another expert refused to write the necessary report, according to the judge, supported the view that his report was “contrived.”

In response to a request by Professor Perloff, Judge Kocoras later wrote that his opinion may have been “unkind, unnecessarily so.” *In re Brand Name Prescription Drugs Antitrust Litig.*, 1996 WL 351178, at *2 (N.D. Ill. 1996). In 1999 Judge Posner ruled that Perloff’s testimony was excluded on “erroneous grounds.” *In re Brand Name Prescription Drug Litig.*, 186 F.3d 781, 786 (7th Cir. 1999).

99 The demand for the services of any expert will likely be determined by a number factors including institutional authority. In cases like those of Dr. Lucas, institutional authority may be so overwhelming as to override the impact of negative publicity as it pertains to bias.

case.¹⁰⁰

Somewhat different is *In re Aluminum Phosphide Antitrust Litigation*,¹⁰¹ in which the court mounted a personal attack and laid bare a faulty methodology. The case and its extensive history reveal the battle of the experts and credentials¹⁰² at its best or worst depending on one's perspective. At issue was a damage estimate by an expert economist, described by the court as "an expert for hire."¹⁰³ The methodology employed by the expert to calculate damages was a generally accepted "before and after" approach.¹⁰⁴ In antitrust cases, this means comparing prices charged during the period of the violation with those charged during a period after or before the violation. Roughly speaking, the difference between these two prices is the damage to the victims.¹⁰⁵ In this instance, the expert selected a five-year period for the period of the violation and a one-year period after the conspiracy for the "normative" period. The court noted that the expert had declined to use data from the period before the conspiracy and that, if he had done so, the damages would have been less. In addition, the expert selected a normative period that was evidently the period for which prices were lowest, thereby increasing damages. Finally, according to the court, the expert had not considered factors¹⁰⁶—other than the end of the antitrust violation—that could account for the lower prices. The court concluded that the "analysis [was] driven by a desire to enhance the measure of plaintiffs' damages even at the expense of well-accepted scientific principles and methodology."¹⁰⁷

Less harsh in tone but with a similar emphasis on conscious bias is *Concord Boat Co. v. Brunswick Corp.*,¹⁰⁸ a 1999 opinion by the Eighth Circuit. The expert, a Stanford University economist, was retained to testify on both liability and damage matters in a monopolization case under section 2 of the Sherman Act. The expert used a theoretical model that, according to the court, ignored "inconvenient evidence."¹⁰⁹ Specifically, the expert calculated damages on the basis of a theory that suggested plaintiffs were damaged whenever the defendant's market share exceeded fifty percent. The court pointed out that the defendant had

100 Equally blunt is the opinion in *American Airlines v. Allied Pilots' Association*, 53 F. Supp. 2d 909 (N.D. Tex. 1999), in which the judge describes the testimony of three experts as "unbelievable, untrustworthy and unreliable." *Id.* at 934.

101 893 F. Supp. 1497 (D. Kan. 1995).

102 See *supra* text accompanying notes 70-74.

103 893 F. Supp. at 1500.

104 *Id.* at 1499. See generally Roger Blair & William Page, "Speculative" Antitrust Damages, 70 WASH. L. REV. 423 (1995); Jeffrey L. Harrison, *The Lost Profits Measure of Damages in Price Enhancement Cases*, 64 MINN. L. REV. 751 (1995).

105 Multiplied, of course, by the number of units purchased.

106 893 F. Supp. at 1503-05.

107 *Id.* at 1506-07.

108 207 F.3d 1039 (8th Cir. 1999).

109 *Id.* at 1056.

achieved a seventy-five percent market share before the illegal conduct started.¹¹⁰ Moreover, the expert had not included in his analysis industry factors that would account for the defendant's increase in market share which were not illegal and about which he had knowledge.¹¹¹

An opinion that completely eschews personal commentary but, by describing the methodological error, leads to only one conclusion is *Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc.*¹¹² The economic expert had been retained to determine the economic impact associated with an alleged tying arrangement in violation of the Sherman Act.¹¹³ The alleged violation involved a seller of postcards that had the exclusive right to manufacture and sell Disney theme cards. That seller required distributors purchasing Disney cards to also purchase a certain number of more generic cards. One of the alleged anticompetitive effects was to raise the price of the generic cards in the relevant market. In order to demonstrate this, the expert compared the price of these post cards in the market in which this impact occurred with the prices in other locations. According to the expert, the price of a card was five cents higher in the affected market as compared to other markets. According to the trial court, the survey was "of little value" and based on a "biased sample."¹¹⁴ Evidently, the sellers the expert surveyed in the affected market were "gift and souvenir shops"¹¹⁵ rather than retailers generally. By selecting only higher priced outlets, the expert created a higher likelihood of finding support for his client's case.

2. The Costs of "Outings"

The question raised by these examples of judicial admonition or

¹¹⁰ *Id.*

¹¹¹ A particularly angry attack that seems to stress the personal side, but did not lead to exclusion of the expert, is *City of Tuscaloosa v. Harcross Chemicals*, 877 F. Supp. 1504 (N.D. Ala. 1995). The expert was retained to testify on the existence of a conspiracy among sellers of repackaged chlorine to cities and utilities. The court went to great lengths to describe the way in which the testimony seemed contrived. First, the expert (an economist) offered as evidence of scholarly acceptance of his approach a 1969 article by (then) Professor Richard Posner in which Posner suggested a method for courts to use in assessing conspiracies. The court noted that not only had Posner changed his view but that the view expressed had never been the law. *See id.* at 1525-26. Second, the court pointed out that the expert had taken inconsistent positions on the issue of what areas were affected by the conspiracy. Finally, the court noted that the professor had relied on the fact that the price of the product sold by the alleged conspirators increased faster than the cost of the principle raw material. The expert had not examined the possibility that other costs could be responsible for the price increases. Moreover, when pressed in his deposition about the possibility that the increased price could be associated with increases in other costs, the expert testified that his opinion would not change, "no matter how significant other costs" were. *Id.* at 1527.

¹¹² 138 F.3d 869 (11th Cir. 1998).

¹¹³ 15 USC §§ 1-7 (1994).

¹¹⁴ 138 F.3d at 877.

¹¹⁵ *Id.*

“outings” is whether relatively public accusations of dishonesty can, by lowering the demand for some experts or types of testimony, lower the costs of litigation by providing a meaningful incentive for all experts to be more objective.¹¹⁶ Obviously, any effect of this nature would be influenced, if at all, by the publicity surrounding the judicial condemnation and even, ironically, the institutional authority of the judge writing the opinion. Ultimately, in economic terms, the issue for the expert who does not adhere to a principle of truthfulness is the expected cost of a judicial thrashing. The potential costs depend on the markets in which the expert sells his or her skills. This analysis requires dividing experts into two categories. For the professional expert, there really is only one market and the issue in that market is whether the criticism, from the point of view of buyers, renders the expert less effective. On the other hand, part-time experts have, in theory, two markets to consider. The first is, again, the market for testimony and credentials in which the relevant question is whether the expert’s effectiveness has been decreased. The second market is practically unlimited, but the remarks here are concerned with the academician and the market for these individuals as teachers and scholars.

I will discuss the academic market and then the more general market but, first, there are some common factors that will determine the cost to the expert of dishonest testimony. Obviously, the testimony must be discovered to be biased. The opposing party will typically bear this cost and the probability of detection may vary with the resources that party can devote to the effort. In addition, there is the separate probability that a judge will expose the bias in his or her opinion. The cost may also be a function of whether that discovery and some expression of judicial disgust is publicized in a manner that comes to the attention of those capable of lowering their demand for the expert’s services.¹¹⁷ And, of course, buyers in the market must have sufficiently attractive alternatives to make them likely to substitute the services of other experts for the ones who have been found out.¹¹⁸

116 Obviously, well before any judicial opinion is issued, the biased expert can raise the cost of litigation substantially by requiring the other side to counter the testimony in a way that exposes the bias of the expert. Thus, any generalized impact of judicial admonition will only have an impact on future testimony.

117 As discussed below, the importance of publication will vary depending on the markets in which the expert sells his or her services.

118 Without getting too deeply into the economics of the matter, the likelihood that any particular expert will feel the sting of the market’s disapproval will depend on the elasticity of supply and demand. For example, if an expert is exposed as being highly biased but tends to be one of the few offering testimony in a field it is more difficult for attorneys to switch to other experts. Experts with high institutional authority may be the hardest to replace. This may seem overly analytical from an economic point of view but not so much that the possibilities have gone unnoted. At a recent conference, Marvin Frankel introduced Charles Wolfram, an expert in the field of professional ethics, with the following:

Now all our problems are about to be solved. Chuck Wolfram, who teaches at Cornell, is

a. The Expert as an Academic

Most difficult to assess is the impact of express judicial displeasure on the career of the expert as an academician. University politics are complicated matters and the impact of a judicial trashing could play out in a number of ways, all of which hinge on whether academic associates of those performing as expert witnesses actually know or care about the ups and downs of a fellow academic's court room experience. It is rare that one runs across the type of publicity experienced by Robert Lucas.¹¹⁹ In fact, it is more likely that, as Professor Gross has put it, "what the expert witness says in court is generally invisible and inaudible in her own professional field."¹²⁰ In any case, would publicity change the academic expert's behavior? Obviously, even the most self-assured expert has a personal preference for not being publicly chastised. Other than this, the outside endeavors of the academician seem likely to affect his or her prospects in one or more of three rather subtle ways. First, publicity that one has acted as an expert, honestly or dishonestly, may lead to further inquiry into whether the academician is spending too much time moonlighting. Second, to the extent character is an issue in hiring and professional advancement in the academic marketplace, this type of publicity is to be avoided. On the other hand, the role of character in these decisions is not clear.¹²¹ Third, sloppy or biased courtroom work may begin to cast a shadow over the academic's more scholarly efforts which may be scrutinized more closely and with a skeptical attitude. Although it

the author of a substantial, significant leading book on our subject. He's been the reporter of an authoritative work in progress, the ALS's restatement of law governing lawyers. He's also seen frequently around the country as an expert witness on the subject, which fascinates me. It obviously is much too difficult for judges. Unlike other issues of law, issues with respect to professional ethics seem to have become game for expert testimony and a small oligopoly, including Jeff Hazard and Steven Gillers, who travel around the country and teach judges about what these various subjects of ethics mean . . .

Judicial Conference, Second Judicial Circuit of the United States, 160 F.R.D. 297, 345 (1994). I do not suggest nor do I have any way of knowing whether testimony by Wolfram, Hazard or Gillers is biased. I offer this quote only to illustrate that the expertise and credentials of some experts may create in those experts market power or, more technically, services for which there is a relatively inelastic demand.

119 See *supra* text accompanying notes 1-5. For a discussion of a case involving Martha Nussbaum, another highly regarded academic, see Mendelsohn, *supra* note 84.

120 Gross, *supra* note 13, at 1178. Even the expert in the *Aluminum Phosphide* litigation, see *supra* text accompanying notes 101-07, received only scant attention. See Expert Opinion on *Aluminum Phosphide* Damages Held Economically Unreliable, 69 Antitrust & Trade Reg. Rep. (BNA) 1726, at 198 (Aug. 17, 1995).

121 This is only anecdotal but in nearly 30 years of academic life I recall the issue of character only being raised a few times. In all these occasions, the questions arose with respect to something specific to the academic appointment itself. For example, I have seen instances in which exaggerations on résumés as well as rumors about efforts to date students have been held against a candidate. But my impression is that academics treat the issue of character in expert testimony as part of a different world.

is admittedly an empirical question, the probability that the misdeeds of an academic expert would become both known and taken so seriously by colleagues as to create any real incentive to be less biased seems low.¹²² And, incentives introduced into the system are not one-dimensional; one response to this type of cost would be that the expert increases his or her efforts to avoid detection.

b. The Expert as an Expert

The academic and professional expert both must sell their skills in the more generalized market for expert witness services. Here the issue is whether the expert's effectiveness is decreased and the demand for his services lowered when biases are revealed. One likely difference between this market and the academic market is that it is much more likely that any misdeeds will be discovered by those making the retention decision. Even biases revealed by attorneys in deposition testimony are likely to be subsequently discovered since most competent attorneys will make it a point to cull through as much of the prior testimony of an opposing expert as is possible. Of course, for this information to have an impact on future testimony, it must have the effect of lowering the demand for the expert's services which will only follow if the expert is deemed to have become less effective. The impact on effectiveness depends on what use can be made of this information. Put differently, it only impacts effectiveness if it is likely to undermine the credibility of the witness in the eyes of the judge or jury.¹²³

Information about past revealed bias *could* come into play at two points. The first involves the decision of whether the expert's opinions will be presented to the trier of fact. In other words, is it possible that evidence of the expert's bias or bad character will work its way into a *Daubert* or *Daubert*-like hearing? If so, the implications for the expert's effectiveness and, therefore, the market for her services, could be enormous. The threat that an expert will be precluded from testifying by showing past bias to a judge would almost certainly lower demand for that expert. Second, if the expert's testimony makes it to the trier of fact, the prospect that bias can be demonstrated by admonitions of prior judges would also seem to have a

122 Judge Posner writes on this point, "Professors may incur heavy nonpecuniary cost in diminished academic reputation (something they greatly value, or else they would not be in academia) if they are shown to be careless or dishonest witnesses." Posner, *Economic Approach*, *supra* note 7, at 1537. How greatly academicians value a reputation for being honest in courtroom proceedings is not clear. If the norms within the profession are that there are "different rules" for expert witness efforts, the nonpecuniary loss may be quite low even when bias is discovered.

123 Not that the impression of the judge or jury is the only end. In fact, the perceived vulnerability of the expert will be important in settlement negotiations. An attorney who retains an expert who is likely to be exposed as biased will likely find that the settlement value of the case will decline.

powerful demand-reducing influence.

Unfortunately, there do not appear to be easy answers to whether prior instances of expert witness dishonesty can be effectively used at either point.¹²⁴ First, take the case of a *Daubert* hearing and the example of an economist testifying on the subject of damages. In a prior case, the expert had used a before and after methodology to calculate damages and was shown to have selected a base period that maximized damages.¹²⁵ The question of whether that information can be used in the context of the *Daubert* proceeding may hinge on whether it is seen as going to the issue of character or bias.¹²⁶ The way I have phrased the question may provide part of the answer. Since the *Daubert* hearing is a matter of law and focuses on the soundness of methodology, it is difficult to see how evidence of bias in a past case would be relevant and, at least officially, part of the judge's assessment. On the other hand, bias inherent in the proposed methodology is certainly part of the *Daubert* test and past use and reactions to that methodology, if properly presented, could go to the issue of bias in the testimony under consideration. Thus, the best course of action would seem to be to attack the character of the expert indirectly by arguing that the *methodology* is similar to what the expert has used in the past and has been ruled unacceptable. This is implicitly something more than a challenge to the current methodology in that it is an appeal to the judge to assess a pattern of "hired gun" behavior by the expert.¹²⁷

This strategy will be more difficult when the expert has been shown to be biased on one matter but is now testifying on another. For example, suppose the expert using a faulty before-and-after study in order to inflate damages is called to testify on the issues of market share and market definition.¹²⁸ An expert who has deliberately manipulated the before-and-

124 There are, obviously, many ways in which the expert's integrity can be undermined on cross-examination, including use of prior testimony or materials written by the expert. This is a different matter than an effort to portray the expert as untrustworthy based on prior bad publicity.

125 This is similar to the pattern found in some of the cases discussed above. See *supra* text accompanying notes 101-07.

126 Here I use the concept of "character" in the more generic sense meaning specifically that an expert who testifies with a knowing bias is one who lacks character.

127 Perhaps this is what occurred in connection with the events leading up to the best selling book, *A CIVIL ACTION*. In materials written about the book, William Cheeseman describes one expert's deposition testimony as amounting to an opinion that "almost every man-made substance causes almost every known illness." LEWIS A. GROSSMAN & ROBERT G. VAUGHN, *A DOCUMENTARY COMPANION TO A CIVIL ACTION* xv (1999). According to Cheeseman, the expert was disqualified. See *id.*

128 Market definition, very generally, means identifying all those competitors selling goods that are reasonably interchangeable. In other words, they compete with each other. The goal is to identify the defendant's share in the relevant market in order to ascertain the likely anticompetitive effects of the defendant's actions. From the plaintiff's point of view a narrow market definition is beneficial because the defendant's share—calculated as a percentage of the entire market—will be higher and, thus, the anticompetitive dangers of the defendant's activities greater. See E. THOMAS SULLIVAN & JEFFREY L. HARRISON, *UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS*

after calculation in order to inflate damages is also likely to be willing to artificially exclude some competitors from the market in order to define it more narrowly and, therefore, inflate the defendant's market share. Certainly this represents a pattern of behavior by the expert, but the only hope here is likely to be an implicit appeal to the judge.

The "outing" of a dishonest expert could also come into play at trial.¹²⁹ Here, a direct use of outside information pertaining to the expert's trustworthiness will run into two hurdles. The bald presentation of an opinion of a judge in a prior case that the expert is not to be trusted is hearsay and unlikely to fit within the exception for public documents.¹³⁰ This is not to say that the materials that the judge in the prior action relied upon would not provide a useful basis for cross-examination. Still, the judge's conclusion is not likely to be admissible. The second hurdle is Federal Rule of Evidence 404, which prohibits the use of evidence about character in order to impeach a witness. A generalized attack on the honesty of the expert is likely to be excluded.

The line between honesty or "character" and bias may not be that great when the witness being questioned is an expert witness. In fact, the issue of character for an expert witness seems inseparable from the notion of conscious bias. And, given the relatively lenient status afforded efforts to show bias, this type of character testimony may be admissible assuming the hearsay rule could be avoided. The mere fact that experts testify for those paying them is not very useful since it covers both honest and dishonest experts. In addition, the impact, if any, can be easily canceled out by a similar showing by opposing counsel. On the other hand, if the expert is consistently retained by one side or the other for one purpose or has left a paper trail of being rejected under *Daubert*,¹³¹ the "hired gun" mind-set would likely be admissible for purposes of showing bias and, by implication, character. And, while the actual words of past judges would likely not be admissible, perhaps everything short of those words would be.¹³² In other words, payment joined with a history of exclusions under *Daubert* would seem to offer to the attorney a chance to impeach an expert that may not be matched by opposing counsel.

The impact of judicial responses to biased or dishonest testimony on

(3d ed. 1998).

129 Again, I want to emphasize that effectiveness at trial is an issue largely because it affects the usefulness of the expert at all stages of the process, including settlement.

130 Hearsay is excluded under Rule 802 of the Federal Rules of Evidence. The public records exception for "factual findings resulting from an investigation made pursuant to authority granted by law" is found in Rule 803(8)(c). *Nipper v. Snipes*, 7 F.3d 425 (4th Cir. 1993), citing FED. R. EVID. 803(8)(c). See also *U.S. v. Jones*, 29 F.3d 1549 (11th Cir. 1994).

131 Obviously, the *Daubert* challenge would not be mounted if the mistakes favored the side opposite the one retaining the expert.

132 See GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 411 (3d ed. 1996).

the effectiveness of experts at the *Daubert* stage or at trial is obviously difficult to gauge. In one sense, its impact as a controlling tool depends on a series of links that logically precede the admonition, including discovery of the bias (or a pattern of bias) and some kind of public statement that is discovered by those who control demand. This effect will be higher if it is on an issue that is very similar to, or the same as the past testimony and if there is a pattern of testimony that can be discerned. There are, however, two important qualifiers. The first is the risk aversion of the attorneys retaining the expert. It is likely that, all things being equal, attorneys would strongly prefer to avoid experts who have been shown to be biased regardless of the context. Second and more importantly is how much an attorney is able to act on his or her risk aversion, which is a function of the availability of alternative experts who will opine in a manner consistent with the attorney's needs.¹³³ It is this second qualifier that dampens one's optimism about a long run and generalized impact of judicial admonition as a means of control. It seems quite likely that the demand for actual tainted experts may fall but they may be replaced in the market by those who are untainted and prepared to say what is necessary to be "effective."

C. *Private Causes of Action*

There is a slight possibility that expert witness bias or dishonesty can be affected by traditional causes of action in tort or contract.¹³⁴ To return to the economic perspective, the objective is to require the expert to internalize the costs imposed on others by exaggerated or dishonest testimony. A rule that permits a producer to ignore external costs is like a subsidy flowing from those incurring the external cost to the producer—just as residents downstream from a polluting factory can be viewed as subsidizing the owners of the factory. Expert witness are, by and large, permitted to ignore the costs imposed on others. This is because any suit by an adverse party or even a "friendly" but disappointed party that could have the effect of curbing excesses must first and primarily contend with the traditional immunity afforded testimony of witnesses. Before examining the common law measures to curb expert witness abuses, it is useful to review the bases for this immunity.

133 This raises the issue of whether the amount of shopping done by the attorney in looking for an expert willing to say what is "needed" should enter into the evaluation of the expert's credibility.

134 Obviously, a contract theory is only available to the party retaining the expert. When the plaintiff in these cases has plead both tort and contract theory, the court's analysis has tended to emphasize the tort theory. See *Mattco Forge, Inc. v. Arthur Young & Co.*, 6 Cal. Rptr. 781 (Cal. Ct. App, 1992); *Murphy v. A.A. Mathews*, 841 S.W.2d 671 (Mo. 1992). In at least one instance the plaintiff relied on a theory of misrepresentation. See *Panitz v. Behrend*, 632 A.2d 562 (Pa. 1993). In this case, the alleged misrepresentation occurred when the expert testified at trial differently than she had allegedly led the client to believe she would testify.

1. Expert Witness Immunity

Expert witness immunity can be quite broad, extending not just to actual testimony but to the work done in preparation for that testimony.¹³⁵ Expert immunity evolved from a narrower immunity in actions based on defamation,¹³⁶ and in modern times is traced to *Briscoe v. LaHue*.¹³⁷ The most remarkable aspect of *Briscoe* is how each of its rationales for protecting lay witnesses seems to support the opposite approach to expert witnesses. For example, part of the reasoning of the Court was that liability will make witnesses reluctant. The notion of “reluctance” seems hollow—even absurd—as a rationale when applied to those who supply testimony for profit. In commercial contexts, “reluctance” has a practical meaning. It is associated with raising prices, earning a lower profit or going out of business. Increased exposure to lawsuits will mean that experts will either self-insure or purchase malpractice insurance.¹³⁸ Thus, the cost of operating the “business” and the prices charged will also be likely to increase. In theory, costs will go up less for those experts who are competent and honest. Just as physicians who incur high malpractice insurance expenses will narrow the range of procedures that they will perform, so will expert witnesses who disproportionately incur expenses associated with their liability either offer a narrower range of services, or go out of business. Similarly, liability costs cause producers to internalize the costs of their defective products and to, therefore, reduce the number of defects. There is no reason why an individual who sells his or her opinion should be immunized from this process.

A second rationale cited in *Briscoe* is that witnesses who are concerned about liability may be more likely to “magnify uncertainties.”¹³⁹ It is true that experts, like anyone else, would like to hedge their bets. However, the market must again be taken into consideration. Attorneys obviously will shop to find the most effective expert, and experts inclined to unwarranted equivocation will hardly be attractive candidates for testimony. Thus, unlike the lay-witnesses for whom there is little reason not to be cautious, even excessively cautious, there is a “penalty” for the expert who is so inclined. One likely result of liability is that the expert will be candid in his or her testimony not only about areas of uncertainty but areas of certainty as well.

Another problem with applying *Briscoe* in the context of expert

135 See *Bruce v. Byrne-Stevens & Assocs. Eng'rs*, 776 P.2d 666 (Wash. 1989).

136 For a brief history of the rule, see Jensen, *supra* note 13, at 194.

137 460 U.S. 325, 333 (1983).

138 Insurance may be unavailable for the deliberate distortion, meaning that the liability costs will be borne directly by the expert.

139 *Briscoe*, 460 U.S. at 333.

witnesses is that it not clear exactly from whom the expert is to be protected. In reality, both sides in a case in which an expert is retained have an interest in curbing overzealousness. For the party retaining the expert, a lengthy and expensive process in which the expert's testimony is eventually disallowed or is thoroughly undermined on cross-examination is hardly of benefit. Obviously, the party adverse to the expert can incur substantial costs illustrating the bias or incompetence inherent in the expert's research and testimony. Both sides, therefore, have at least a potential interest in avoiding the over-zealous expert, which leads to the question of which party is barred by *Briscoe*.

The confusion involved in applying *Briscoe* has played out in the courts. For example, in a case in which a suit against a friendly expert was barred, the Washington Supreme Court reasoned that the absence of immunity "would encourage experts to assert the most extreme position favorable to the party for whom they testify."¹⁴⁰ On the other hand, in a 1992 Missouri opinion,¹⁴¹ the court viewed the interests served by immunity quite differently. In permitting a suit by a party against a friendly expert the court noted that "we do not believe that the threat of liability will encourage experts to take extreme and ridiculous positions in favor of their clients in order to avoid suits by them."¹⁴² Instead, that court adopted the view that the policy favoring immunity was one of protecting *adverse* witnesses from harassment, but not from actions by those who have retained them.¹⁴³

2. Liability to Client

Despite the mismatch of *Briscoe*'s rationales with respect to experts and the existence of some confusion about how to apply them, courts have been slow to expose expert witnesses to liability from either side. There has been some slight change in this policy when it comes to suits by the parties who have retained the expert.¹⁴⁴ Perhaps the leading case in this regard is *Murphy v. A.A. Mathews*,¹⁴⁵ in which expert engineers were retained by a drilling company for the purpose of preparing a claim based on the additional costs the drilling company had incurred in its own

140 *Bruce*, 776 P.2d at 670.

141 *Murphy v. A.A. Mathews*, 841 S.W.2d 671 (Mo. 1992).

142 *Id.* at 681. The Missouri court also rejected the view that liability would mean that it would be difficult to retain experts. *See id.*

143 *See id.* at 679.

144 *See* Mark Hansen, *Experts are Liable, Too*, 86 A.B.A.J. 17 (2000). There is, of course, an important distinction between what is happening in the courts and what may be happening in the expert witness practice. The fact that some courts have found that immunity does not extend to experts all the time may mean that the issue of the competence and honesty of experts is being addressed before formal legal actions are taken.

145 841 S.W.2d at 671.

contract to perform foundation preparation work for nuclear power plants. The plaintiff claimed that the defendant had negligently prepared and understated the claim¹⁴⁶ in a variety of ways, most of which went to attention to detail and methodology.¹⁴⁷ The court expressly considered and rejected the relevance of the two rationales offered by the United States Supreme Court in *Briscoe*. The court agreed that the Supreme Court's rationales applied to "witnesses of unique fact or opinion who are otherwise unrelated to the litigation,"¹⁴⁸ but said that this "does not necessarily contemplate the situation of a professional who voluntarily agrees to assist a party in the litigation process for compensation."¹⁴⁹

The court then relied on four related bases to hold that the expert could be liable. First, it noted that the immunity afforded witnesses originated as a bar to suits based on defamation.¹⁵⁰ Second, it cited the separation between actual testimony, which would be afforded protection, and "litigation support services."¹⁵¹ Third, the court argued that the possible liability of the expert would not decrease the likelihood of "frank and objective testimony."¹⁵² Finally, given that the expert was an advisor to and sometimes an advocate for the client, the court saw no reason to treat these functions any differently in the litigation context than in other contexts in which the expert would be liable.¹⁵³ This 1992 decision of the Missouri court, along with opinions expressing similar views in California,¹⁵⁴ New Jersey,¹⁵⁵ and Texas,¹⁵⁶ may have marked the beginning of a trend toward greater liability for expert witnesses, at least with respect to the parties who retain them.

In Pennsylvania, which has generally adhered to the traditional view of broad, basically per se immunity, a more substantive approach seems to have emerged. In *Panitz v. Behrend*,¹⁵⁷ a law firm sued an expert witness that it had retained in a personal injury action.¹⁵⁸ As part of trial preparation the expert provided the firm with prior depositions in which

146 The actual proceeding was an arbitration by the Missouri court, which characterized the issue as "whether [the] immunity should extend to bar malpractice claims against professionals hired to perform litigation support services." *Id.* at 674.

147 *See id.* at 672-73.

148 *Id.* at 674.

149 *Id.*

150 *Id.*

151 *Id.* at 680. The importance of this separation is not clear. The actual words spoken by an expert at trial will almost always reflect the work that was done in preparation.

152 *Id.*

153 *See id.*

154 *Mattco Forge, Inc. v. Arthur Young & Co.*, 6 Cal. Rptr. 2d 781 (Cal. Ct. App. 1992).

155 *Levine v. Wiss & Co.* 478 A.2d 397 (N.J. 1984).

156 *James v. Brown*, 637 S.W.2d 914 (Tex. 1982).

157 632 A.2d 562 (Pa. 1993).

158 This was in the form of a counterclaim when the law firm was sued by the expert for her fees. The law firm's legal theory was that the expert was guilty of gross negligence and misrepresentation. *See id.* at 563.

she had testified in a manner that was favorable to their theory. However, she decided that her reasoning in the prior depositions was inaccurate and did not testify as expected during cross-examination.¹⁵⁹ The court noted that immunity applied not just to in-court testimony but to pre-trial communications as well. In addition, the policy of encouraging "full and frank" testimony would be undercut by permitting the action.¹⁶⁰ On the other hand, in the 1999 case *LLMD of Michigan v. Jackson Cross Co.*,¹⁶¹ the Pennsylvania Supreme Court considered an action against an expert witness who had made a mathematical error in a damage calculation that was revealed on cross-examination.¹⁶² The court reversed a lower court holding that the immunity applied, reasoning that none of the policies favoring immunity were applicable and distinguishing *Panitz* on the basis that immunity in that case was based on the fact that the witness was expressing an opinion. Accordingly, the court declared, "[d]ifferences of opinion will not suffice to establish liability of an expert witness for professional negligence."¹⁶³

Another example of this chipping away is *Aufrichtig v. Lowell*,¹⁶⁴ in which the issue was the liability of an expert witness/physician who was scheduled to testify in an action by the insured against the insurer. The expert testified one way at his deposition and then signed an affidavit admitting that his deposition testimony was false. Realizing that his testimony would be useless at trial, the plaintiff settled with the insurance company and then sued the physician, claiming that his likely ineffectiveness at trial resulted in a settlement that was below what it otherwise would have been.¹⁶⁵ The court held that the physician could be liable to the client for his deposition testimony.¹⁶⁶

On the other hand, the near per se immunity of experts, as reflected in a Washington Supreme Court opinion in *Bruce v. Byrne-Stevens & Associates Engineers*, remains the prevailing view.¹⁶⁷ The Washington

159 The disappointing testimony came during an expected line of questioning on cross-examination. *See id.* at 563-64.

160 *Id.* at 564-66.

161 740 A.2d 186 (Pa. 1999).

162 The actual error was made by the individual performing the calculations. The witness was unable to explain the error or to recalculate the damages while on the stand. The day after the testimony, the plaintiffs accepted a settlement offer. *See id.* at 187.

163 *Id.* at 191.

164 650 N.E.2d 401 (N.Y. 1995).

165 *See id.* at 403-04.

166 *See id.* at 405. *See also* *Lavit v. Superior Court*, 839 P.2d 1141 (Ariz. 1992) in which the court applies immunity to an expert psychologist who the parties had agreed to retain. The court distinguished that situation from "private psychologists working exclusively for a party and serving as and advocate for that party. . . ." *Id.* at 1146.

167 In that case, the experts were retained to estimate the cost of restoring lateral support to the property of the plaintiff in an action against a neighboring property owner whose excavation work had resulted in subsidence in the soil of the plaintiff's property. Plaintiff obtained a judgment only to discover that it was well below the amount needed to repair the land. *See Bruce v. Byrne-Stevens &*

Court rested its opinion on the view that the expert—hired or not—was there to serve the court. Accordingly, “[t]he mere fact that the expert is retained and compensated by a party does not change the fact that, as a witness, he is a participant in a judicial proceeding.”¹⁶⁸

Most important is the question of whether this tendency toward greater liability is having or is likely to have an impact on the objectivity of experts. At this point in the development of actions against experts, it is hard to find support for the proposition that experts are more likely to be careful about overstating the claims of those who have retained them. In fact, all of the cases examined that pit an expert against the party who retained that expert involve situations in which the expert’s testimony was insufficiently supportive of the client’s position. Although *Jackson Cross* is “close” in the sense that the expert’s overstatement ultimately damaged the client, there appear to be no cases in which an expert has been sued by a former client when the expert’s testimony was unhelpful as a result of having been excluded by the court or because it was so overstated that it was completely undermined on cross-examination.¹⁶⁹ The developments with respect to expert witness liability do, however, appear to open the doors to greater accountability to clients based on a more substantive analysis of expert witness immunity. If one accepts the tentative proposition that the expert feels a greater duty to the attorney than to the client and that his testimony may reflect the attorney’s adversarial instincts, this trend toward greater accountability may have the effect of making experts more attentive to client interests.

3. Liability to the Opposing Party

While some erosion of the wall of immunity can be found in the case of actions by clients against their own experts, it is difficult to find any sign of that erosion when the suit is by the party against whom the expert has testified. The principal and perhaps only exception is an unusual Texas case, *James v. Brown*,¹⁷⁰ in which an individual who was involuntarily hospitalized mounted a suit for damages. In an action against three psychiatrists who had examined her, the court seemed to apply the broad immunity afforded experts. It distinguished, however, the actual communications of the physicians from the diagnosis itself. According to the court, “[the plaintiff] is not prevented from recovering from the doctors

Assoc. Eng’rs, 776 P.2d 666 (Wash. 1989).

168 *Id.* at 669.

169 The closest example is *Jackson Cross* in which botched testimony was excluded. See *supra* text accompanying notes 161-63. In that case, the botched testimony did greatly overstate the actual damages suffered by the plaintiff in the principle action. The overstatement was a result of a mathematical error, however, not expert exaggeration.

170 637 S.W.2d 914 (Tex. 1982).

for negligent misdiagnosis-medical malpractice merely because their diagnoses were later communicated to a court in the course of judicial proceedings.”¹⁷¹

Far more typical is another Texas opinion, *Lombardo v. Traugher*,¹⁷² in which a defendant in a malpractice action sued the experts who had testified against him. The plaintiff alleged that the expert was not qualified and had testified in a manner that was untrue and totally contravened the medical record.¹⁷³ The trial court granted summary judgment for the defendant and the appellate court affirmed. There is nothing especially noteworthy about the opinion, but it is important to keep in mind that, in granting summary judgment, the trial court was required to assume that the allegations of the plaintiff were true. That is, even if the expert had lied and testified in a manner that was totally inconsistent with the medical record, he was still unaccountable to the party against whom he testified. The policy of protecting the expert from retaliatory lawsuits was sufficiently important to offset even the plaintiffs’ worst-case scenario.¹⁷⁴

In *Lombardo*, as in most cases with the same holding,¹⁷⁵ the rationale is basically the same as that offered by the U.S. Supreme Court in *Briscoe*¹⁷⁶—i.e., witness liability would decrease the willingness of individuals to act as witnesses and may cause them to testify in a less candid manner.¹⁷⁷ As in the case of friendly clients, these rationales seem ill-suited to the commercial context. The “reluctant” expert is simply one who may charge more to reflect higher costs. The cost increase would presumably be correlated with the expert’s track record, and the possibility of being “priced out of the market” is actually desirable. Similarly, liability would seem to increase candor with respect to any limitations of the testimony offered. Finally, as an empirical matter, it is not clear how often adverse party suits would be brought. The adversely affected party would be faced with a costly and risky undertaking that would be foolhardy to pursue except in relatively clear cut cases.

D. Peer Review

One promising but complicated incentive for greater expert care and honesty is the threat of peer review in one form or another. This could take

171 *Id.* at 918. The court’s decision may be explained by a Texas statute imposing a duty of care on psychiatrists examining patients under the Mental Health Code. *See id.*

172 990 S.W.2d 958 (Tex. 1999).

173 *See id.* at 959.

174 *See id.* at 960.

175 *See, e.g.,* *Lythgoe v. Guinn*, 884 P.2d 1085 (Alaska 1994); *S.T.J. v. P.M.*, 556 So.2d 244 (La. 1990); *Central Ice Machine v. Cole*, 509 N.W.2d 229 (Neb. Ct. App. 1993); *Provencher v. Buzzell-Plourde Associates*, 711 A.2d 251 (N.H. 1998); *Sharp v. Miller*, 468 S.E.2d 799 (N.C. 1996).

176 *See supra* text accompanying notes 14-17.

177 *Briscoe v. LaHue*, 460 U.S. 325, 333 (1983).

the form of a state licensing authority or a private professional association. The primary distinctions between the two are the nature of the sanctions available,¹⁷⁸ the extent to which decision-making is left exclusively to peers, and the possible legal exposure of the reviewing organization.¹⁷⁹ The first issue in either of these contexts is whether the expert under scrutiny may rely on the same witness immunity that would shield him or her from civil actions by friendly or adverse parties.

The paucity of cases on this issue¹⁸⁰ suggests that the use of professional sanction has not been widely used as a means of addressing expert witness behavior. On the other hand, when the issue of immunity has been addressed, it has generally been held not to apply to peer review procedures. For example, Washington, which has applied immunity rather broadly to experts connected to a legal proceeding, has not been as generous when an expert is called to task by a licensing board. In *Deatherage v. Examining Board of Psychology*,¹⁸¹ a state licensing agency disciplined a psychologist for negligently rendering opinions in child custody cases. The psychologist, Deatherage, argued that expert witness immunity should be extended to him in the context of the disciplinary action. The Washington court held that the immunity did not extend to these proceedings. In so doing, it distinguished its view that immunity from civil liability to the expert's client was necessary in order to ensure that experts would offer testimony.¹⁸² According to the court, the threat of disciplinary action was far less likely to discourage expert testimony than the threat of civil action by one of the parties. In addition, although a party in the original action may file a complaint, that individual is not a party to the disciplinary proceeding.¹⁸³ Consequently, disciplinary actions are more in line with protecting the public generally as opposed to the interests of an individual party.

A California case, *Budwin v. American Psychological Association*,¹⁸⁴ involved a private association. Dr. Budwin served as a neutral expert in a child custody proceeding. After the proceeding, one of the parents filed a complaint with both the state licensing officials¹⁸⁵ and the private, voluntary association, the APA. The basis of the complaint was that Dr.

178 The state agency is more likely to control the professional "death sentence" in the form of license suspension or revocation.

179 The state agency is more likely to be immune to an antitrust action.

180 A Pennsylvania decision in 1998, *Huhta v. State Board of Medicine*, 706 A.2d 1275 (Pa. 1998), noted that the issue was one of first impression in Pennsylvania and that it appeared that the issue had only been considered by one other state at that time.

181 948 P.2d 828 (Wash. 1997). This was the case cited by the *Huhta* court.

182 The case the court distinguished was *Bruce v. Byrne-Stevens & Assocs. Eng'rs*, 776 P.2d 666 (Wash. 1989), which is discussed in the text accompanying notes 167-69.

183 See 948 P.2d at 831.

184 29 Cal. Rptr. 2d 453 (Cal. Ct. App. 1994).

185 The State Board of Medical Quality Assurance denied the complaint. *Id.* at 455.

Budwin had falsely stated the extent of his examination of the relationships between the parent and children. The APA sustained the complaint and required Dr. Budwin to take additional training. Part of his argument for a writ of mandate was that the immunity afforded his testimony in the case of a civil action by the parents would apply to keep that testimony from being the basis of discipline by the APA. The lower court granted Budwin's motion for summary judgment on the basis of this argument. The appellate court reversed, holding that the immunity applied only to "civil actions" and "damage claims."¹⁸⁶

Although immunity is unlikely to hinder disciplinary action, it is not clear that the possibility of peer review holds much promise as a means of controlling expert witness abuses. First, since the adversely affected party is unlikely to receive a financial benefit, the incentive to initiate such actions is weakened. Second, there is a filtering effect of requiring the complaint to go through an organization that has, as its primary interest, the portrayal of the members of the profession as generally trustworthy. Thus, any actual sanction is more likely to be motivated by a sense that the expert stands to damage the prestige of the profession than by the interests of a particular party. Third, peer review as a means of expert witness control is likely to leave large gaps in the controlling process. For example, attorneys are at least nominally held to ethical standards, but economists are not officially licensed and their private associations are more for the purpose of scholarly exchange as opposed to standard setting. Fourth, the professional sanctions have the character of public goods. That is, each member of the professional association may view his or her individual benefit from the effort to discipline a reckless expert as fairly minor and may choose to let others take care of the problem. Thus, in a typical instance of free-riding, the dishonest expert may be unscathed as each person hopes that his or her fellow professional will take the lead. A final disincentive is generated by the fact that professionals who take an active role in the private disciplinary process may find themselves defendants in antitrust actions.¹⁸⁷

Leaving the policing of expert witnesses to peers is questionable in any case. The typical disciplinary process can involve both reporting by members of the profession and decisions about the measure of discipline by members of the profession. They are also likely to be competitors of the professional who is charged with unethical behavior. Thus, as in the case

¹⁸⁶ In so doing, the court cited the U.S. Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976), for the proposition that immunity from a private civil actions would not extend to disciplinary action by one's peers. See 29 Cal. Rptr. 2d at 457.

¹⁸⁷ Disciplined experts do, of course, have access to the courts in the form of antitrust actions if they feel they are have been disciplined in a way that ultimately has an anticompetitive effect. In many instances, those experts participating in a state sanctioned review process will qualify for "state action" immunity. See generally SULLIVAN & HARRISON, *supra* note 128.

of most self-regulation, there is a conflict of interest. This conflict can have an immediate effect on competition and lead to the suppression of ideas that do not currently fit within the confines of conventional thought in the field.¹⁸⁸

A sense of the complexity of self-regulation can be gleaned by reference to issues concerning the American Medical Association's 1998 adoption of a resolution that a physician's expert testimony is the practice of medicine.¹⁸⁹ On first impression, this is attractive because it seems to provide a way for physicians to police members of their profession who act as experts.¹⁹⁰ On the other hand, it may protect in-state physicians from out-of-state physicians who, if they testified, would be involved in the illegal practice of medicine.¹⁹¹

III. Proposals for Lowering the Costs of the Use of Expert Witnesses

The problems associated with the use of expert witnesses have given rise to a number of proposals to curb abuses. A great deal has been written about the use of neutral experts¹⁹² and at the most extreme level, actions based on perjury could be mounted and sustained.¹⁹³ An intriguing proposal offered by Judge Posner requires attorneys to reveal how much shopping they did before finding an expert who would testify in a satisfactory manner.¹⁹⁴ All of these proposals have certain strengths and weaknesses and the materials cited here should assist the reader in reviewing them. In this section, two proposals are offered which have

188 See Richard A. Clifford, *AMA Proposal Would Protect Bad Doctors*, CHI. L., Sept. 1998, at 8.

189 See *AMA Defines Medical Testimony as the Practice of Medicine*, DIET DRUGS LITIG. REP., May 1998, at 17.

190 See Clifford, *supra* note 188; McAbee, *supra* note 9.

191 See Clifford, *supra* note 188.

192 See generally Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining a Role for the Court-Appointed Expert in Assessing Scientific Evidence*, 48 EMORY L.J. 995 (1994); Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59 (1998); Gross, *supra* note 13, at 1187-1208; Tahirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposed Amendment to Rule 706 of the Federal Rules of Civil Procedure*, 6 YALE L. & POL'Y REV. 480 (1988); Carl B. Meyer, *Science and Law: The Quest for the Neutral Expert Witness. A View from the Trenches*, 12 J. NAT. RESOURCES & ENVTL. L. 35 (1997).

Largely in connection with neutral experts, examination of international conventions is also instructive. See e.g., Alfred W. Cortese, Jr. & Kathleen L. Blaher, *Civil Justice Reform in America: A Quest for Parity with Our International Rivals*, 13 U. PA. J. INT'L. BUS. L. 1 (1992); Eric Ihyung Lee, *Expert Evidence in the Republic of Korea and Under U.S. Federal Rules of Evidence: A Comparative Study*, 19 LOY. L.A. INT'L & COMP. L. REV. 585 (1997).

193 See e.g., *U.S. v. Sherman*, 150 F.3d 306 (3d Cir. 1998); *Spaeth v. U.S.*, 218 F.2d 366 (6th Cir. 1955); *Kline v. State*, 444 So.2d 1102 (Fla. Dist. Ct. App. 1984); *Montana v. Moses*, 1999 WL 147477 (Mont. 1999); *Ex Parte Jean Matthews*, 933 S.W.2d 134 (Tex. 1996). Criminal prosecution for perjury by an expert witness is very rare. Quite common, however, are requests for a new trial based on the perjured testimony of an expert.

194 See Posner, *Economic Approach*, *supra* note 7, at 1541.

received little attention. They are designed to address directly both the form and substance related to the costs of experts. The first is to decrease the reliance on institutional and cumulative authority in order to lower the “noise” level that may hide expert bias. The second is to make experts more accountable to clients and to opposing parties by increasing their civil liability, linking the expert’s obligation to the standards of *Daubert* and *Kuhmo Tire*.

A. *Limiting and Ignoring Appeals to Authority*

1. Institutional Authority and the Halo Effect

As discussed earlier, it is hard not to conclude that a market exists for institutional authority somewhat apart from intellectual authority.¹⁹⁵ Otherwise, it is difficult to reconcile the great variation in expert witness fees.¹⁹⁶ The impact of institutional authority may be felt at a number of levels. It can influence a judge directly in the context of a *Daubert* hearing. As a separate matter, it can have an impact on the determination of whether the witness is qualified as an expert. In addition, the clever direct examiner can get this information before the jury even if opposing counsel is willing to stipulate that the expert is qualified. Finally, institutional authority can affect the settlement positions of the attorneys who will understand its likely effect on the judge and the trier of fact.

There are two basic ways in which the “noise” of institutional authority can affect the judicial process. One, which is not the primary focus here, is the great potential for manipulation of the indicia of authority. Take the example of the law professor appearing as an expert witness. If he has finished law school in the top ten of his class, this may be brought out when he testifies. It may also be brought out that the attorney was elected to the Order of the Coif, was a member of Law Review, was named to the dean’s list and graduated *cum laude*. This appears to be an impressive list but, in fact, it is not a list at all: it includes only one piece of possibly useful information—that the witness made good grades in law school.

The second type of “noise” is what the judge or jury may “hear” when credentials are presented: information about the character and competence of the expert that may or may not be accurate. This is a result of the “halo

195 It is just as likely that a market exists for any number of other factors that increase the expert’s effectiveness. For example, personal manner and appearance may come into play. In addition, if triers of fact are more likely to be comfortable with someone from the same geographical area, place of residence will be relevant.

196 See *supra* text accompanying notes 60-69.

effect” or “the tendency to see different traits as ‘belonging together’ when they logically do not.”¹⁹⁷ There is a great deal of evidence that institutional authority can be powerful in a number of contexts. One wonderful example involves a ranking of undergraduate business schools. The rankers—senior personnel executives—ranked Harvard, Stanford, Columbia, Chicago and Northwestern in the top twelve even though none of those schools had an undergraduate business program.¹⁹⁸ Another example of the power of institutional authority was revealed in a study in which researchers selected articles from leading psychology journals that did not practice blind reviewing.¹⁹⁹ The articles were resubmitted with less recognizable names and “lower” institutional affiliations. Of the 12 articles used in the experiment, only one was still found to be of publishable quality.²⁰⁰ Moreover, in a perfect instance of adding insult to injury, the reasons for rejecting the formerly acceptable articles were often framed in terms of intellectual authority.²⁰¹ If “experts” in various academic disciplines are not immune from the effects of institutional authority, it seems likely that judges and jurors are at least as susceptible. Although it would difficult to design a study that would isolate the impact of institutional authority, existing jury studies report results that are consistent with the importance of institutional authority.²⁰²

In addition to the empirical evidence and the common sense appeal supporting the argument that the halo effect is at work in the case of experts, there is anecdotal evidence of its importance in judicial opinions as well. For example, in one case noted earlier,²⁰³ the judge goes to great length to distinguish the experts on the basis of institutional authority, noting, among other things, that the disfavored expert received a Ph.D. in “Agricultural and Applied Economics” and served as “a guest lecturer at the University of Minnesota and St. Olaf College.” “In contrast,” the favored expert “is a professor of economics at Vanderbilt University,” has a “Ph.D. in Economics,” and was a “Senior Fulbright Scholar.”²⁰⁴ Similarly, Kocoras’s criticism of Nobel Prize winner Robert Lucas in *Brand Name Prescription Drug Antitrust Litigation* seems to be more

197 Teresa Amabile & Albert H. Hastorf, *Person Perception*, in SOCIAL PSYCHOLOGY 247 (Bernard Seidenberg & Alvin Snadowsky eds., 1976).

198 DAVID S. WEBSTER, ACADEMIC QUALITY RANKINGS OF AMERICAN COLLEGES AND UNIVERSITIES 142-43 (1986).

199 In other words, referees knew the authors’ names and their institutional affiliations.

200 Douglas P. Peters & Stephen J. Ceci, *Peer-Review Practices of Psychological Journals: The Fate of Published Articles, Submitted Again*, 5 BEHAV. & BRAIN SCI. 187 (1982).

201 *Id.* at 191.

202 See Champagne et al., *supra* note 33, at 8; Rosenthal, *supra* note 61, at 530; Shuman et al., *supra* note 65, at 200-01.

203 United Phosphorus, Ltd. v. Midland Fumigant, Inc., 173 F.R.D. 675, 679 (D. Kan. 1997).

204 *Id.*

difficult given his institutional authority.²⁰⁵ And Judge Posner seems inclined to defer to a cardiologist who is “distinguished” even though his testimony seems to fail any test of methodological soundness.²⁰⁶

2. Illogical Inferences and Institutional Authority

The halo effect of credentials can involve two false connections. The first is the supposition that the higher an expert’s academic or other credentials, the better her character and, therefore, the more she should be relied upon. The second is that the amount of useful information an expert can bring to a jury about a specific topic is positively correlated with prestige, prizes, and honors. Obviously, there is no logical connection in either case. With respect to character, assume for a moment that impressive credentials are correlated with the potential to do high-quality work. That is a different issue from how that potential is used. The potential may be used in an objective effort to discover the truth. Or, it may just as easily be used to promote the interests of those paying the bill. The second supposition is wrong because credentials, in some instances, are not correlated with one’s ability to communicate relevant information to a jury. For example, the prestige of serving as Chair of an economics department, as opposed to being merely an Associate Professor, likely has no bearing on an expert’s ability to inform a jury about the proper definition of a market. Defining a market is not especially difficult. In addition, the expert’s position as Chair could be the result of many factors, almost none of which are directly related to expertise on market share matters. Similarly, experience beyond certain levels may be irrelevant to an expert’s testimony. For example, the side effect of a drug can probably be described with as much expertise by a pharmacist with ten years of experience as one with thirty years of experience.

3. Cost-Decreasing and Cost-Increasing Institutional Authority

The institutional authority of expert witnesses and its relationship with jurors is not, however, as simple as the relationship between an author and the reviewers for an academic journal. In the case of an academic journal, an author’s work is reviewed by peers who are expected to be sufficiently knowledgeable to assess the merits of a scholarly manuscript on the basis of intellectual authority (even if they choose not to). Jurors

205 Professor Lucas’s credentials had created “high expectations.” *In re Brand Name Prescription Drugs Antitrust Litigation*, 1999 WL 33889, at *9 (N.D. Ill. 1999).

206 *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996). *See also* *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055-57 (8th Cir. 2000); *Rushing v. Kansas City S. R.*, 185 F.3d 496, 505-08 (5th Cir. 1999).

and judges acting as the triers of fact cannot act as peer reviewers. As a result, they require assurance that the expert witness possesses adequate educational or experiential bases upon which to form helpful opinions. Thus, some measure of a halo effect is required in that we assume certain labels, such as Ph.D. and M.D. to be correlated with proficiency. This need for reference to more than pure reason is captured in Federal Rule of Evidence 702, which permits a witness to be qualified as an expert by virtue of “knowledge, skill, experience, training or education.”²⁰⁷

This complication means that credentials can both lower and raise costs. With respect to reducing costs, graduation from an accredited program or experience in the relevant field is likely to be correlated with possessing the requisite knowledge for expressing an opinion. In this sense, credentials lower costs by permitting courts to skip the process of administering some form of qualifying exam or competency test to every proposed expert. Whatever benefits may be credited to institutional authority, it also clearly contributes to the costs described in Part II of this Article. For example, the tenuous connection between institutional authority and the quality of one’s analysis raises the expected cost of a wrong decision. In addition, because judges or jurors may be overly impressed by credentials, both parties are moved to retain experts whose halo effects cancel each other’s out.

The key, then, is to distinguish predominantly cost-decreasing qualifications from predominantly cost-increasing qualifications. The process of making this distinction is analogous to the gate-keeping judges are assigned under *Daubert*. For example, *Daubert* permits a judge to disallow (close the gate to) testimony not supported by accepted methodology. A cardiologist presumably would not be allowed to testify that a specific person died of heart disease as a result of smoking cigarettes based solely on statistical evidence that smokers suffer from heart disease at a rate higher than nonsmokers. Similarly, permitting a witness to testify that she received a prestigious award or attended a highly ranked university enables the jury to make an inference that requires too broad of a leap of faith and appropriate gate-keeping would appear to be in order.

Institutional authority gate-keeping should come into play in two instances. The first is when there is little or no correlation between the proffered credential and the expert’s ability to assist the trier of fact. For example, the fact that a person is a dean or a department head or the president of a professional association is probably not related to whether she is more qualified to express an opinion in the relevant discipline than another expert lacking such credentials. Most academics would probably agree that scholars may choose to accept an administrative post for many

207 FED. R. EVID. 702.

reasons, and that having a first-rate research agenda is not generally among them. Unfortunately, titles like “Dean” or “Department Chair” can mislead judges and juries who are not familiar with academic life. Similarly, being elected to a local, state or national post within a professional society is unlikely to be correlated with one’s actual abilities as a scholar.

Second, even when there is a correlation between the qualification and the expert’s competence, there may be a problem similar to what statisticians call “multicollinearity.” Multicollinearity exists in a statistical sense when one is attempting to assess the relationship between independent variables and dependent variables.²⁰⁸ With respect to the expert witness, the key is to determine which factors are correlated with competence.²⁰⁹ In the case of a scientist, one might hypothesize that competence is correlated with the number of articles published in prestigious journals, academic rank, years of experience, government grants, and the number of awards. The problem is that these “variables,” although they may be related to competence, are also related to each other. For example, government grants typically lead to articles, and articles typically lead to higher rank, as does the number of years of experience. Presenting each of these “qualifications” as having separate importance may overstate to the trier of fact just how qualified the expert is. Like the professor described above, this is repetition of essentially the same information.

4. Authority That Matters: Objective Achievement and Specific Expertise

The critical practical issue is whether judges are capable of filtering out institutional authority in both their own evaluations and in decisions about what the triers of fact will be permitted to consider. In proposing that judges be more cautious about institutional authority, one might consider the response of Judge Kozinski of the Ninth Circuit Court of Appeals when commenting on the role of the judge as gatekeeper after the Supreme Court’s opinion in *Daubert*. Kozinski observed that judges are “largely untrained” and “no match for any of the witnesses whose testimony we are reviewing.”²¹⁰ In addition, this scenario is complicated by the fact that the

208 See DAVID W. BARNES, STATISTICS AS PROOF 339-40 (1983).

209 It is useful to distinguish this from the example of the law professor who made high grades and is recognized for them. In that case, all the pieces of information contain exactly the same message. In the case of multicollinearity, the indicia do not contain exactly the same information. Instead, one causes the other.

210 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995). A recent study suggests that Judge Kozinski was right. See Margaret Bull Kovera & Bradley D. McAuliff, *The Effects of Peer Review and Evidence Quality on Judge Evaluations of Psychological Science: Are Judges Effective Gatekeepers?* 85 J. APPLIED PSYCHOL. 574, 585 (2000) (finding that a significant proportion of judges may admit flawed scientific evidence and concluding that “it is

information may not fall clearly into the cost-decreasing or the cost-increasing category.

Fortunately, separating useful information about an expert's credentials from useless and potentially misleading information seems far simpler than the task assigned to courts under *Daubert*.²¹¹ The question the judge should ask is, "Does this information make me feel confident that the expert is able to assist the trier of fact on this specific issue?"²¹² The answer should be yes when the credentials are directly related to objective measures of achievement and are closely related to the issue under consideration. Put differently, the emphasis should be on relevant substantive achievement rather than institutional achievement. This means eliminating or ignoring authority that is not logically connected to the specific issue and which is subject to the multicollinearity problem.

Some examples are illustrative. First, consider the issue of institutional authority as a measure of competence or the "no correlation" problem. Suppose the expert is asked to testify on the existence of a conspiracy among sellers of aluminum siding. He or she holds a Ph.D. in Economics from a highly ranked school. Triers of fact may assume from this information that this expert is more competent than an economist from a lower-ranked school. Although one must be relatively competent at something in order to receive a Ph.D. from the highly ranked school, it is not at all obvious that a graduate of a less prestigious university would not be just as if not more competent at providing sound testimony about conspiratorial acts in a specific industry. In fact, the first expert may have scraped through the "better" school while an opposing expert may have excelled at a less renowned school. Since the institutional affiliation is probably irrelevant, it can be misleading if allowed into the case. Far more closely related to a reliable analysis is whether the expert has undertaken specific course work in the field and whether he or she has conducted post-graduate research on the specific issue at hand.

Similarly, a professorship at any highly respected university can be misleading in two respects. First, it is not a measure of actual expertise on the matter at hand. The important considerations would be the areas of research that led to promotion to full professor, whether the expert has been productive recently, and what areas the expert has consistently

important to identify methods of training judges and jurors to evaluate scientific evidence as if they were scientists").

211 *Daubert* requires "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993).

212 The process is not different than learning to accurately assess a résumé of a job applicant. Although the point is arguable, it seems fairly easy for most insightful people to spot the puffing found in a great many résumés.

taught. Thus, an expert affiliated with a less prestigious institution may, for many reasons, actually be more competent to testify on the specific issue than the highly decorated professor who has not done much recent research. In addition, a more competent economist may choose to teach at a less prestigious school for many reasons unrelated to his competency. For example, the expert may have passed over positions at more prestigious institutions due to geographic preferences, the complications of moving teenage children, attachments to his or her certain community, etc. Thus, any inference with respect to competence would be spurious. Instead, the most important points when considering an academic expert's testimony are the expert's training, teaching, and research in the area. In the case of other experts, a court should consider whether the expert has passed licensing or certification exams relevant to his or her testimony and whether his or her professional work has required direct engagement on the issue at hand.

Second, consider the multicollinearity issue. Recent studies of legal academia strongly suggest that academics are able to place their writings in more prestigious journals if they are already affiliated with prestigious universities.²¹³ This is consistent with the halo effect discussed above. Given this reality, independent consideration of both a position at a prestigious school and publication in highly regarded journals amounts to double counting.²¹⁴

In a sense, the Federal Rules of Evidence provide the framework in which to address both the false correlation and the multicollinearity problems. A great deal of evidence concerning institutional authority is arguably irrelevant and could be excluded as such under Rules 401 and 402. Rule 402 provides that "[e]vidence which is not relevant is not admissible,"²¹⁵ and Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."²¹⁶ Administrative posts within academia certainly fail this test. Similarly, elected offices in professional associations also fall short. And, as I have argued above, even institutional affiliations can be misleading since they suggest something about competence that may not be accurate. On the other hand, holding a

213 See Collier, *supra* note 20, at 169-72.

214 Equally dangerous are descriptions of appointments to positions that have little to do with the issues to be addressed in the case, gross numbers of articles or books, and election to offices of professional organizations. Each of these pieces of information may tell something slightly different about an individual and each might be relevant with respect to a variety of inquiries. But a court's interest in an expert witness' qualifications should be narrowly focused and each qualification should be expressly linked to the matter under consideration.

215 FED. R. EVID. 402.

216 FED. R. EVID. 401.

Ph.D. from an accredited school and having conducted research and written in the field are relevant. One could argue that all of the above qualifications are relevant even if only marginally so. Here, Federal Rule 403 would come into play. Rule 403 permits the exclusion of relevant evidence if it is “misleading” or a “needless presentation of cumulative evidence.”²¹⁷ Thus, Rule 403 has the capacity to address the multicollinearity problem.

Limiting appeals to institutional authority means focusing the judge and jury on the nuts and bolts of what actually creates expertise. For example, in the case of an academic expert testifying on market share, it may not be important for the scholar who has taught and written in the fields of industrial organization or antitrust economics for several years also to have written his or her Ph. D. dissertation in the field years earlier. Similarly, it is not critical for a physician who has practiced in the relevant field for a number of years to have conducted extensive research. Considerations of this sort deal with achievements, not associations. These considerations are not as flashy as university name-dropping and Nobel Prizes, but they are just as responsible for expertise.

Although the existing framework allows courts to be more vigilant to control the noise of institutional authority, the most fundamental barriers to action may be the judges’ own ignorance of the dangers of institutional authority and unwillingness to act. A judge may choose not to shield fact-finders from this information out of fear of being overruled on appeal, but this problem is likely overstated. The basic standard on appeal for a ruling on admissibility is abuse of discretion. Since judges under the Federal Rules of Evidence have the duty to protect jurors from misleading or cumulative evidence, greater sensitivity by judges to these issues would not seem likely to result in an unacceptable incidence of reversals.

Furthermore, judges may resist an initiative that seeks to devalue the types of institutional authority that may have given rise their own professional success. Obviously, individuals do not become judges solely because they are the best qualified. A high intellect, a keen sense of fairness and a broad-based education are not necessarily considered in the selection of judges. Instead, the selection of judges is probably itself deeply affected by institutional matters. Conceivably, this would cause some judges to instinctively reject steps that would undermine the value of impressive-sounding labels.

217 FED. R. EVID. 403.

B. *Internalizing the Cost of Bias*

As outlined in Part II,²¹⁸ expert witness exaggeration and excess can be costly to both parties to an action. The party presenting the expert runs the risk that the expert's testimony will be excluded or will be undermined on cross-examination. The adverse party incurs the expense of revealing the expert to the court or the jury. Economic theory, as well as common sense, tells us that when a producer of anything, including biased testimony, is not required to absorb the costs of production, his or her cost-benefit analysis will be distorted. As a result, too much of the good, service, or information will be produced. The key, from an economic perspective, is to ensure that the overzealous expert internalizes the costs he or she imposes on the parties.

The notion of internalization—a form of accountability—as used here carries a number of implications. The expert who knows that he or she may be required to internalize these costs may be less zealous in supporting the client's position.²¹⁹ This may seem like an undesirable effect but in a world where economic pressures create incentives for experts to offer biased and misleading testimony under the guise of "science," the net effect is likely to be greater candor, independence, and professionalism. For example, an expert who is being "pushed" by an attorney to calculate damages at a higher figure or to be unduly forceful in his or her testimony with respect to another issue²²⁰ will have to weigh the possible risks of liability. Similarly, this weighing may motivate experts to be more forthright with attorneys and clients about the limitations of their cases. Moreover, experts may be more inclined not to take extreme positions and to explain why such extreme positions would not ultimately serve the client. In fact, as noted earlier, the most remarkable thing about *Briscoe* is that the pitfalls discussed by the Court seem to be desired effects when applied to commercially available witnesses.

An obvious disadvantage of this proposal is that it may increase litigation. Two issues are of particular concern. The first is whether the fear of additional liability would mean even more excesses by experts rather than less. Second, even if the threat of liability would curb expert witness excesses, would the costs of this method of achieving that outcome exceed the benefits? These are important questions on which reasonable people may disagree. One possibility is that finding a few experts liable would result in a "tipping point" effect which deters other experts without

218 See *supra* text accompanying notes 42-62.

219 Or, alternatively, raise prices to reflect the higher cost of doing business.

220 This is not a matter to be taken lightly. In one empirical study, the vast majority of experts report being pressured by attorneys to offer more favorable testimony. See Shuman et al., *supra* note 65, at 201.

actual litigation.

1. Actions by Friendly Parties

As described above, nearly all the reported cases dealing with expert witness liability have been brought by the expert's clients and involve instances where the expert's testimony was less favorable to the client than the client wished. These cases may encourage an expert to be more careful, but they hardly seem designed to encourage the expert to offer less biased testimony. On the other hand, these cases represent the beginning of a generalized notion of expert witness accountability. The concept of accountability to the client can work in two ways. First, as the cases reported here suggest, the expert may understate the merit of the client's position. This is typically the result of negligence and is not directly connected to the bias of the expert. The second way the expert can harm the client is by overstating the client's case to such an extent that the testimony is easily undermined at trial or excluded altogether. In this case, the logical theory of liability is contract. Depending on how the retention agreement is structured, the client either contracts with the expert or is a third-party beneficiary of a contract between the attorney and the expert.²²¹ In either case, the retaining party has certain legitimate expectations under the contract. One of these expectations would seem to be that the testimony will not be so transparently biased that it will be of no use or even damaging to the client.

a. *Daubert* as a Contract Standard

In order to define the contractual obligations owed by the expert to the client, it is useful to look at *Daubert* and, to a lesser extent, *Kuhmo Tire*.²²² Those opinions can be viewed as describing what an expert is expected to deliver. More specifically, *Daubert* serves as a natural starting point in fleshing out such a contract. The Uniform Commercial Code's notions of an implied warranty of merchantability²²³ and trade usage²²⁴ are most on-point here. The implied warranty of merchantability requires that

221 In an informal survey of about twenty individuals acting as expert witnesses, more than half regarded themselves as having contracted with the attorney for the client. To dispense with one contractual technicality, there seems to be little doubt that the client would qualify as an intended, as opposed to an incidental, beneficiary of the contract between the attorney and the expert. See generally E. ALLAN FARNSWORTH, CONTRACTS §§ 10.2-10.6 (3d ed. 1999).

222 This discussion refers primarily to *Daubert* because *Kuhmo Tire* seems more like an extension of *Daubert*-type reasoning than a change in direction.

223 See U.C.C. § 2-314 (1999). Obviously, the UCC would not apply to expert testimony directly, but it does provide a useful statement of what contracting parties are generally entitled to expect.

224 See U.C.C. § 1-205 (1999).

goods “pass without objection in the trade under the contract description.”²²⁵ Trade usage is defined as “any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.”²²⁶

The similarity of these concepts to the language of *Daubert* is remarkable. *Daubert* sets out a two-part test. First, is the offered testimony based on scientific knowledge?²²⁷ Second, is the testimony likely to assist the trier of fact?²²⁸ For the purposes at hand, the more interesting issue is specialized knowledge because that is, in effect, the “product” the client is buying.²²⁹ *Daubert* goes to the heart of what the quality of that knowledge should be. With respect to scientific knowledge, the Supreme Court listed factors judges could use to assess the quality of the knowledge.²³⁰ The first is whether the theory or technique has been or can be tested. Second is whether the technique has been subjected to peer review. Third is the error rate of the technique. Fourth is whether the technique is generally accepted by the relevant scientific community. *Kumho Tire* generalizes these factors and the issue becomes whether, in the courtroom, the expert employs “the same level . . . of intellectual rigor that characterizes the practice of an expert in the relevant field.”²³¹

If the efforts of an expert are goods, a methodology that did not pass muster under *Daubert* would also be inconsistent with an implied warranty of merchantability and the client’s reasonable expectation. A couple of simple examples may be useful. Suppose a law professor is hired as an expert witness on the subject of wildlife law in the early 1900s. An agreement to research and prepare testimony on the topic would carry with it the understanding that the expert would apply some systematic research technique. A search of major treatises, cases, statutes and the like would be an implied part of the contract. Simply interviewing the sons and daughters of people who lived and hunted wildlife during the late nineteenth or early twentieth century would not be accepted in the market for those who do legal research for a living.

For a real-life example, consider the *Phosphide Litigation* case

225 See U.C.C. § 2-314 (1999).

226 It may not be entirely accurate to call both of these concepts “gap fillers.” In a sense the implied warranty of merchantability does not fill a gap for purposes of interpretation but simply indicates what a buyer is buying. “Trade usage,” on the other hand, is more likely to be relied upon when the parties have not addressed a specific issue.

227 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993).

228 *Id.*

229 Obviously, the client also benefits from having that knowledge assist the trier of fact, but the mischief experts can make seems most likely to come with respect to the quality of the specialized knowledge offered.

230 509 U.S. at 593-95.

231 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

discussed earlier.²³² In that case, the expert for the plaintiff attempted to calculate damages using a “before and after” technique. The expert compared the prices paid by the plaintiffs during the violation with prices paid after the violation. In selecting “after” as the base period, the expert seemed to select the period that would cause the damage calculation to be most favorable to the client and to ignore other equally valid—but not as favorable—data.²³³ Although the bias in this expert’s efforts worked in favor of the client, it was ultimately excluded under *Daubert*.²³⁴ A presumption that the expert has not adequately performed the contract also seems in order.²³⁵

b. The Presumption and its Limits

The suggestion here is that an expert who fails a *Daubert* hearing has presumptively breached the contract with the client.²³⁶ This does not mean that every disappointed client has a presumption against the expert. *Daubert* is not about the substance of the testimony but about the methodology. Thus, using *Daubert* as a basis means requiring the expert to apply in an unbiased manner those methodologies that are typically employed in his or her field.

Still, two specific qualifications are necessary. First, the fact that the expert passes the *Daubert* test does not mean that she has necessarily delivered what the client was entitled to expect under the terms of the contract. To understand why, in addition to *Phosphide Litigation*, consider *Southern Card*²³⁷ and *Blue Cross and Blue Shield v. Marshfield Clinic*.²³⁸ In *Southern Card*, the economist was retained to determine the impact on price of alleged anticompetitive conduct. He compared prices for postcards in the affected geographic areas with prices elsewhere. In making this comparison, the expert seemed to select stores in the affected area that were likely to have relatively high prices without regard to anticompetitive

232 See *supra* text accompanying notes 101-07.

233 *In re Aluminum Phosphide Antitrust Litigation*, 893 F.Supp. 1497, 1500-03 (D. Kan. 1995).

234 In *Aluminum Phosphide Antitrust Litigation*, the testimony was simply characterized as “economically unreliable.” *Id.* at 1507.

235 This is subject to an important exception that will be discussed below. There will be instances in which the client may accept “less” in the sense that the client supports the biased and risky testimony.

236 The proper remedy is likely to be equal to reliance or restitution, which, in this instance, would probably mean the expert is required to refund any fees collected. Expectancy, in terms of the value of higher quality testimony or some measure of the possibility of a more successful lawsuit, seems far too amorphous to be taken seriously. An additional possibility is that the expert, if his party should lose and is liable for the costs of the winning side, might be liable for the portion of those costs related to the use of experts necessary to demonstrate the bias in the expert’s work.

237 138 F.3d 869 (11th Cir. 1998).

238 152 F.3d 588 (7th Cir. 1998).

actions.²³⁹ According to the court, this sampling rendered the testimony “of little value.”²⁴⁰ In *Marshfield Clinic*, Judge Posner labeled an expert’s efforts to determine damages as “worthless”²⁴¹ because in comparing the prices paid by the plaintiffs during an antitrust violation with those paid by similar buyers outside the area of the violation, the expert had not accounted for factors other than the existence of the violation as possible causes of the price difference.²⁴² The testimony of all three economists appears to involve the manipulation of data or sampling in order to enhance the client’s position. But in only one instance—*Phosphide Litigation*—does it appear that the testimony was excluded. What this suggests is that, while failing a *Daubert* test should create a presumption of defective testimony, not failing does not mean that the expert has delivered on her end of the bargain.

The need for possible liability beyond those instances when the expert fails at the *Daubert* stage is clear when one considers the number of reasons why testimony may avoid the *Daubert* exclusion. There may not have been a *Daubert* challenge. In addition, the *Daubert* challenge may not have been successful even though the work of the expert was biased. In other words, the judge may have gotten it wrong or simply interpreted *Daubert* in a way that limited its effectiveness. In order to understand how the latter might happen, it is useful to focus on the concept of methodology. More specifically, is it a methodological problem when the expert selects the right methodology but then uses data that he or she knows will produce conclusions that are more favorable to the client? For example, in the *Southern Card* case, a court could determine that a price comparison between two markets is an acceptable *methodology* for assessing damages. This may pass muster under *Daubert*. Then, as appears to have happened in that case, the expert may have applied the methodology to biased data. This may be the death knell for the case at summary judgement or at trial.²⁴³ On the other hand, other courts may view the method of selecting the data as flawed and exclude the testimony under *Daubert*.²⁴⁴

In effect, while exclusion under *Daubert* should create a presumption that the testimony is defective, there is little reason that surviving a

239 See *supra* text accompanying notes 112-15.

240 138 F.3d at 877.

241 152 F.3d at 593.

242 *Id.* See also *City of Tuscaloosa v. Harcross Chemicals*, 877 F.Supp. 1504, 1525 (N.D. Ala. 1995), in which the court noted that the theoretical foundation of the testimony of the expert was not an accurate reflection of the law and never had been. See *supra* note 111.

243 Another important reason not to create a counter presumption is that the existence or lack thereof would tend to make the client’s ability to recover under a contract claim largely dependent on the skill of opposing counsel and not on the quality of the “product” actually sold to the client.

244 There seems little doubt, after the more generalized approach suggested by *Kuhmo Tire*, that this is the proper ruling.

Daubert challenge should result in the opposite presumption. Testimony that is vulnerable to being exposed under cross-examination as highly biased is also defective. In either instance, like any breach of warranty case, the issue would be two-fold: what was the client entitled to expect, and was the product consistent with that expectation? It seems obvious that the client is entitled to no more or less than a competent and unbiased opinion that would be viewed as such by the expert's colleagues in the trade. If the opinion is revealed under *Daubert* or cross-examination to be less than that, it seems entirely reasonable to view the expert as having breached an implied warranty.²⁴⁵

The realities of the relationship between the expert witness and the attorney and the realities of data limitations require another very important qualification. While the default position is that the client is entitled under the contract to the expert's best professional judgement, there can be imperfections in experts' work unrelated to bias or fudging. A client, for instance, might seek an expert's work, even when a lack of information might result in quality that would not satisfy the standards for the profession.

For example, a great deal of empirical work may depend on the use of a random sample. It may be impossible or beyond the client's means to allow the expert to generate a random sample. Consequently, the expert will be vulnerable both in a *Daubert* hearing and on cross-examination. The expert who explains the limitations of her testimony but is asked to present it anyway should not be liable to the client for a number of reasons. First, an honest lack of information is hardly a sign of bias. Second, the client—directly or through the attorney—consents to the lower quality of testimony. In essence, the client has waived some of the usual contract rights, or, in more traditional contract terms, there has been a disclaimer by the expert. Third, and most fundamental, the use of this type of testimony is functionally the same as asking the expert to base an opinion on a hypothetical set of facts. For example, in the case of the random sample, the question really is, "If you assumed that the sample were random, what would your conclusion be?" Obviously, this is a standard form of expert testimony, and it shifts from the expert to the attorney the task of demonstrating that the facts assumed are in accord with the actual facts. If they are not, the issue is not the expert's integrity.

There is also the possibility that, even in the absence of data problems, the client will support the expert's imperfect or biased testimony. In other words, the client may prefer, as is often the case, that

245 I have not addressed the issue of what happens if the expert's testimony is less useful because it "understates" the client's case since this is not likely to be the result of expert witness bias. Nevertheless, errors of this nature are less likely to be deliberate in nature and the tort theory may be more appropriate.

the expert do whatever is necessary to make the client's case more appealing. Here there is obviously no liability. The client receives the "service" that was bargained for and assumes the risk that it will not achieve the desired ends.

Although it seems clear that an action that holds an expert accountable for overstatement would enter into the decision-making of the expert, it is less clear that level of internalization would be sufficient to seriously curb expert witness excesses. Because of the nature of contract remedies, the recovery is likely to be limited to the fees paid to the expert. What the client has lost is an opportunity for greater success, but this theory of damages is hard to sustain in a contract action. Moreover, the expectancy of the client, even if it were recoverable, is not the same as the externalities given rise to by the expert's testimony. One measure of those costs would be the expense incurred by the opposing side to "reveal" the expert. Thus, if the client of the expert loses and must pay the expenses of the opposing side including expert witness fees, then including those expenses in the action against the expert would more closely approximate the proper measure of the externalities. This, however, will not cover all the instances of expert witness abuse and when considered along with other limitations on contractual recoveries,²⁴⁶ it seems clear that the threat of a contract action alone would not result in a full internalization.²⁴⁷

2. Actions by Adverse Parties

The shortcomings of a contract action by a disappointed client lead to the more difficult issue of whether to permit an action by the party against whom the expert has testified. This issue is difficult not because immunity for experts has been proven to have a sound empirical or even a principled foundation, but because it represents the status quo. That is, opening experts to actions by parties they have testified against is tantamount to devising a new cause of action: liability when an expert knows or should know that her testimony would not be acceptable generally by her peers in the relevant area of expertise. Given the breadth of this proposal, some readers may be concerned about applying an economic analysis, with its essentially amoral and utilitarian nature, to support it. On the other hand, economic analysis is sometimes relatively lenient in its conclusions and often suggests that certain levels of bad or immoral behavior are efficient. Given this, to the extent that economic analysis supports greater

²⁴⁶ Almost certainly, the expert as defendant could claim that the additional costs were not reasonably foreseeable.

²⁴⁷ Under a contract theory, the costs of the opposing side would be internalized by the expert if, in fact, the opposing side did win and recover costs. This does not, however, cover many of the ways in which experts may create externalities.

accountability, it is unlikely that any other approach could be advanced that would support less accountability. Still, for those who are uncomfortable with the economic approach or do not agree with my rationale for applying it, a brief examination of a more deontological approach is presented.

a. A Rights-Based Approach

From a noneconomic, nonutilitarian perspective, one might ask whether there is any moral basis for the protection of expert witnesses who overstep the bounds of their areas of expertise. To be more direct, is there any ethical basis for protecting those who do not tell the truth or purposely attempt to mislead? It is important to note that this is the same as asking whether it makes sense to require people not to break promises—in this case a promise to tell the truth. And the truth consists of testimony that is not any different from that which would be offered to a body of peers.

There does not appear to be any principled basis to allow misleading testimony to go unchallenged. For example, if one adopts the opposite of the economic, quasi-utilitarian approach in the form of the Categorical Imperative,²⁴⁸ it is clear that the expert who testifies dishonestly violates this standard by using others to further his or her own ends. These experts burden their clients and opposing parties. More importantly, these experts use the honesty of other experts as the means to their own ends. Honest experts legitimize the process and create “capital” in the form of possible believability that allows the dishonest expert to operate profitably. Dishonest experts are the free riders of the judicial system, and their free riding erodes the credibility of even the most principled experts.²⁴⁹

One might argue that this analysis seems to apply to all witnesses, not just to experts. However, there is an important distinction that supports holding expert witnesses to a different standard. The vast majority of lay witnesses achieve their role by fortuity. Time, place and history determine their importance to a trial, and the lay witness has no control over these factors. A witness’s relevancy to the trial is hardly the result of a self-selecting process. Telling the truth may be painful, costly and uncomfortable to the witness. This is markedly different from the expert who volunteers—in essence, bids—for the right to interject herself into a matter with which she is otherwise not connected. Whatever discomfort the lay witness may legitimately or illegitimately weigh when deciding to tell the truth is simply not there for the commercial witness. Whatever discomfort the expert experiences when telling the truth is a discomfort the

248 See IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (Robert Paul Wolff ed. & Lewis White Beck trans., 1969).

249 See also JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

expert has volunteered to endure.

b. The Economic Perspective

Even though immunity is well established, the possibility of requiring experts to internalize the costs they impose on others is not as farfetched as it may initially seem. Already, in many instances, a prevailing party may recover expenses, including the costs of his or her own expert witnesses. Often, a party must incur these expert witness fees simply as a means of rebutting the testimony of experts retained by the other side. So, in a sense, permitting one side to recover costs requires the other side to pay the external costs of its action or defense, including those created by its expert witnesses.

An award for expenses, including expert witness fees, is different, however, in many important respects from an action that would force experts to internalize the costs of their conduct. Since costs are available even in the absence of misconduct, the policies behind awarding costs do not go directly to the matter of controlling experts. Instead, awarding costs seems to be motivated by a goal of discouraging parties from pursuing suits that, for whatever reason, have little chance of success. In addition, awarding costs almost certainly encourages settlement.

Aside from the fact that awarding costs is only tangentially related to controlling experts, this version of internalization falls short of having the desired effect in several other respects. Perhaps most importantly, awarding the costs of experts hired by the losing side does not mean that they actually internalize the costs of their misconduct. Instead, it is more likely that the expert simply collects her fee and moves on to the next case.²⁵⁰ Thus, unless there is an action by the retaining party for the expenses it was required to pay the opposing side, there will be no internalization, and the expert will continue to use a skewed cost-benefit analysis. In addition, a biased expert may impose costs on an opposing party in many ways other than those in which the party retains her own expert and prevails at trial. For example, a party may lose a case as a result of the testimony of an opposing expert that was biased but was not successfully rebutted at trial. A party may successfully challenge the experts offered by the opposing side under *Daubert* but go on to lose the case. A party may invest a great deal in expert witnesses only to decide to settle the case. Although the cost of experts may be accounted for in the settlement figure, these costs may be relatively low when compared to the overall stakes and, thus, play only a minor role in the decision to settle. Thus, as in the case of an adverse decision, the settlement is unlikely to

250 It is fair to note, however, that the expert may find that her services are in lower demand.

affect the expert's decision making.

What all of this suggests is that awarding expert witness expenses to the prevailing party is not as effective in responding to the excesses of experts as direct action by the adversely affected party. As discussed above in depth, currently such an action is virtually unheard of.²⁵¹ Still it makes sense to explore the economic bases for such an action. One can use a couple of basic economic constructs to examine the question. One approach is to adopt a Coasian perspective.²⁵² This admittedly fanciful perspective could be described in two ways. The first is to ask what would be the likely outcome of a transaction cost-free market for expert witness rights. As it stands now, one could argue that experts own the right to be free of liability for harm to those against whom they testify with knowing disregard for generally accepted professional standards. Alternatively, one could envision an auction with the highest bidders choosing between immunity and liability. In either case, the question is which rule is more highly valued.²⁵³ Although the answer is that the rule—if left to the market—would almost certainly be one of expert witness liability, the various interests are worth considering. First, immunity has its greatest value to those who act as experts. As the cases cited in this Article suggest, there is clearly a cadre of experts who will act as advocates for clients and will do whatever is necessary to advance their clients' interests. And, there are honest experts for whom the immunity rule may appear to have little value but who do, in fact, earn significant sums uncovering the dishonesty of others. A rule of liability would almost certainly lower the incomes of experts that can be traced to biased testimony and the job of uncovering it. These experts would value immunity at an amount equal to the income lost if experts were liable. On the other hand, even at the expert stage, the value of immunity is not unequivocally positive. If I am right that some potential experts find the existing process distasteful, they presumably would be willing to pay something to remove the distaste so that they, too, could sell their skills. In addition, there would still be income for experts retained to uncover those experts who choose to risk legal exposure.

At the attorney level, the value of immunity is also not clear-cut. The longer and more convoluted disputes are, and the more time attorneys spend handling them, the higher incomes are likely to be. Experts benefit attorneys by creating uncertainty of outcome, which then increases the need clients have for attorneys. But it is not clear that attorneys would

251 See *supra* text accompanying notes 170-77.

252 See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

253 Coasians will note that this is no different than asking if downstream victims of a water polluting factory would buy the rights to pollute from the factory. In this context the question is whether, in a transaction cost-free environment, this rule would be "purchased" by those favoring a counter-rule in the form of liability for an expert who knows or should know her testimony would be rejected by a panel of peers.

uniformly favor continued immunity. First, some attorneys have likely internalized notions of professionalism that are consistent with higher ethical standards. In fact, many might prefer a more principled process but are forced to use biased experts as a reaction to the use of biased experts by others. Second, what is proposed here is a new theory of liability that actually could create some income producing opportunities for attorneys.

If one thinks of experts and attorneys as, on balance, favoring immunity and the amount of value attributed to the rule as equal to the income lost if the rule were changed, it might appear they would value the current rule by as much as clients would value a liability rule. This is because the choice between an immunity or liability rule appears to be a zero-sum game—extra income for experts and attorneys equals extra expenditures by clients. This, however, misses two important points. Although the financial exchanges between experts, attorneys and clients may appear to have a purely distributive quality, there are, as outlined in Part II of this article, social costs or “pure losses” associated with biased expert testimony. In our hypothetical, free-riderless and transaction cost-free market, those who suffer these losses would break the tie and bid for the liability rule. Second, and putting aside those social costs, there is a difference between the character of the income for experts and attorneys and the payments by clients. Experts typically charge on an hourly basis and their income is relative risk free in the sense that it is unaffected by the outcome of the case. Some plaintiffs’ attorneys and all defense attorneys, too, receive income that is not outcome determined. On the other hand, the expenditure by clients, even if it is the same as distributed to experts and attorneys, is more like a wager since the result of the expenditure is unknown. The no-liability rule not only increases the risk of losing a close case but increases the total exposure of clients by making even spurious claims something to take seriously. In effect, unless they are risk-neutral, clients are likely to value a rule of liability by at least the value attributed to the no-liability rule by experts and attorneys plus a premium to avoid the risks created by the rule of immunity. Or put differently, the current rule almost certainly “costs” clients and others more than it “makes” for experts and attorneys, and the net effect of the hypothetical market exchange or auction would be to adopt a rule of liability.²⁵⁴

The second approach involves a more traditional-sounding tort analysis. The economic view of tort law is that accidents should be avoided when the cost of doing so is less than the expected cost of the

254 Actually, there is a rule and a counter-rule. Rule one is that paid witnesses are not liable to those against whom they testify when they knowingly testify in a manner that is inconsistent with existing standards within their profession. The counter-rule would be that paid witnesses are liable to those against whom they testify whenever they know or should know that their testimony is inconsistent with standard principles within their profession or area of expertise.

accidents themselves. In addition, the effort to avoid accidents should be undertaken by the party who can do so at the lower cost. If one analogizes the cost of biased testimony of an expert to the cost of accidents, the question then becomes which party can least expensively avoid the harm.²⁵⁵ Almost certainly, initial adherence to professional standards by those in control of the research and testimony is less expensive than requiring the opposing side to uncover dishonesty. Thus, the duty of avoiding the “accident” of dishonesty would fall on experts.

c. A Qualification

While simple logic suggests that those who are in control of testimony should bear responsibility for its quality, there is at least one complication (and probably others) that it is useful to address. This issue arises if the prevailing party is awarded expert witness fees. The question is whether that party should then independently have a right of action against the opposing expert. Here one could argue that the prevailing party has been “made whole” by the recovery of costs and there is no reason to permit further action. On the other hand, the fact that the prevailing party has been compensated does not mean that the opposing expert has internalized the harm and, thus, received the proper economic message. From this perspective, a direct action against the expert should be permitted.

On the other hand, in a world of greater expert witness liability, the expert may also find himself answerable to the party retaining him. If that party’s claim is only for the fees it paid, there will be no double counting since the fees paid by the retaining party do not account for any damage the expert has caused other parties. But, if the action by the retaining party is for the costs it was required to pay the winning party for its efforts in undoing the expert, then it would be double counting to permit a separate action by the prevailing party against the expert. An economic distortion similar to that which currently exists would be created and the expert’s “costs” would be overstated.

Conclusion

Judicial opinions over the past ten years suggest that cynicism about expert witnesses has increased. This distrust is warranted by the many examples of expert witnesses who have offered biased testimony. The

²⁵⁵ The usual expression of this is the Learned Hand Formula. An individual is negligent when $P \times L > B$, where P is the probability of the accident, L is the loss and B is the cost of avoidance. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.). When applied to intentional acts, P is equal to 1.

existence of bias and exaggeration is not surprising since what is bought and sold in the market is effectiveness, and not necessarily honesty. Effectiveness is a function of persuasive storytelling and institutional authority.

The introduction of effectiveness or advocacy over honesty gives rise to social costs in a number of forms ranging from wrong decisions to the costs of discovering and revealing the bias of experts. These costs are like the externalities of a polluting factory. More importantly, broad-based immunity for experts means that externalities are not internalized by those who create them. It is simple economic theory as well as common sense that those who profit by producing and selling in conventional markets are apt to increase production when they can escape some of the costs associated with their production.

So far, efforts to control experts have had very limited success. The efforts fall into three general categories: exclusion of testimony, judicial shunning and, less frequently, legal action. Although all three of these have the right direction of influence, they fall short because they only indirectly, if at all, require the expert to internalize costs and have little to do with curbing the use of institutional authority. In addition, a large cadre of witnesses for hire—academicians—are largely isolated from the impact of those measures.

This Article proposes two principle responses to expert witnesses. It suggests using the rules of evidence to greatly limit appeals to institutional authority. In particular it suggests that judges only weigh and allow to be introduced at trial expert qualifications that directly reflect experience and achievement that are relevant to the issue at hand. Second, the article proposes greatly increasing the liability of experts both to those who have retained them—under a contract theory—and to those against whom they have offered consciously biased testimony. This approach entails recognizing that expert witnesses, unlike ordinary witnesses, are engaged in a voluntary commercial undertaking. It follows that the same controls applied to conventional sellers of services should be applied equally to experts.